TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 329.

JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS; NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

GEORGE WALLACE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED MAY 25, 1921.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1921.

1 In the District Court of the United States for the District of North Dakota, Southeastern Division.

JOHN BARTON PAYNE, Director General of Railroads; NORTHERN Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee and Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, and Montana Eastern Railway Company, Plaintiffs,

vs.

GEORGE WALLACE, OBERT A. OLSON, CARL R. KOISTZKY, WILLIAM LANGER, and THOMAS HALL, Defendants.

Pleas Before the Honorable Joseph W. Woodrough, Presiding Judge of the United States District Court for the District of North Dakota.

Be it remembered that on the 12th day of November, 1920, a Bill of Complaint was filed in this case, which Bill of Complaint is in words and figures following, to-wit:

2 *Bill of Complaint.*

(Title of Case.)

To the Honorable the Judges of the District Court of the United States for the District of North Dakota:

John Barton Payne, Director General of Railroads, a citizen and resident of the State of Illinois, Northern Pacific Railway Com-
3 pany, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, Chicago, Milwaukee & St. Paul Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a consolidated corporation created and existing under and by virtue of the laws of the States of Michigan, Wisconsin, Minnesota and North Dakota, and Montana Eastern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Montana, bring this their Bill of Complaint against George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall, citizens of the State of North Dakota, and residents within the said District, and thereupon complain and allege:

I.

By proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and Laws of

the United States, by the joint resolution of the Senate and House of Representatives bearing date April 6, and December 7, 1917, respectively, and particularly under the powers conferred by Section 1 of the Act of Congress approved August 29, 1916, and entitled "An Act making appropriations for the support of the Army for the
4 fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at twelve o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and Montana Eastern Railway Company, and the appurtenances thereof, and directed the possession, control, operation and utilization of the transportation systems thus taken should be exercised by and through W. G. McAdoo, appointed Director General of Railroads.

II.

The Congress of the United States, by an Act approved March 21, 1918, authorized the President to enter into agreements with the companies owning the railroads and systems taken over, for the maintenance and upkeep of the same during the period of Federal control, for a determination of the rights and obligations of the parties to such agreements arising from or out of Federal control; and the President, by proclamation dated March 29, 1918, acting under said Act approved March 21, 1918, and by other powers him thereto enabling, authorized the Director General, either personally, or through such divisions, agencies or persons as he might appoint, and in his own name or in the name of such divisions, agencies or persons, or in the name of the President, to agree with the
5 companies, or any of them, owning such railroads and transportation systems, and to make any and all contracts, agreements or obligations necessary or expedient in connection with Federal control of systems of transportation, as fully in all respects as the President is authorized to do.

III.

Thereafter, W. G. McAdoo, Director General of Railroads, by virtue of the power and authority conferred on him as aforesaid, did enter into certain agreements in writing with the aforesaid companies concerning the Director General's possession and control of the railroads and transportation systems of the aforesaid companies, wherein and whereby it is provided in each of said agreements that the Director General shall either pay, out of the revenues derived from railway operation during the period of Federal control, or shall save the company harmless from, all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes

which under the accounting rules of the Interstate Commerce Commission in force December 31, 1917, are properly chargeable to "railway tax accruals;" that said agreements and each of them are now in full force and effect.

6 If the taxes hereinafter referred to are sustained and payment thereof enforced, the Director General will, under the provisions of said agreements, have to pay the entire tax for the year 1919 and two-twelfths of the tax for the year 1920, the remaining ten-twelfths thereof will have to be paid by the corporate plaintiffs.

IV.

That the said W. G. McAdoo having resigned, the President thereafter appointed the plaintiff, John Barton Payne, Director General of Railroads, and he is now in possession of all the powers and authority formerly exercised and enjoyed by the said W. G. McAdoo, Director General of Railroads.

V.

The Northern Pacific Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Duluth, Minnesota; Superior, Wisconsin; and Saint Paul, Minnesota, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and British Columbia to Puget Sound and Pacific Coast ports.

The Great Northern Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Duluth, Minnesota; Superior, Wisconsin, and Saint Paul, Minnesota, extending westerly from said termini through the States of Minne-

7 sota, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon and British Columbia to Puget Sound and Pacific Coast ports;

The Chicago, Milwaukee and Saint Paul Railroad is a transportation system consisting of railway lines and branches, having their eastern terminus at Chicago, Illinois, and extending northerly, northwesterly and westerly through the States of Illinois, Michigan, Wisconsin, Iowa, Missouri, Minnesota, Nebraska, South Dakota, North Dakota, Montana, Idaho and Washington to Puget Sound and Pacific Coast ports;

The Minneapolis, Saint Paul and Sault Sainte Marie Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Sault Sainte Marie, Michigan, and Chicago, Illinois, and extending westerly from said termini through the States of Wisconsin, Minnesota, North and South Dakota, and into the State of Montana;

The Montana Eastern Railroad is a transportation system consisting of a railway line extending from Snowdon, Montana, to Rickley, Montana, with a branch line running from Fairview on or near the boundary line between the States of Montana and North Dakota, easterly to Watford City, North Dakota.

The said corporate plaintiffs were all chartered as railroad companies, and their railways (which were during the calendar years 1918, 1919, and up to March 1, 1920, in control of the said
8 Director General of Railroads and operated by him) have been devoted to the transportation of passengers and goods, both state and interstate, and have been and now are instrumentalities of interstate commerce. Said corporate plaintiffs before the year 1918 duly complied with all the laws of North Dakota imposing requirements with respect to the doing of business, owning of property, and suing and being sued in that state, and before the year 1918 were, and have since continued to be, duly licensed and privileged to carry on business within that state authorized by their charters and the laws thereof.

VI.

The defendants are officers of the State of North Dakota, duly qualified and acting as such; George Wallace is the State Tax Commissioner, Obert A. Olson is the State Treasurer, Carl R. Kositzky is the State Auditor, William Langer is the Attorney General, and Thomas Hall is the Secretary of State.

VII.

This is a suit in equity between the plaintiffs and the defendants; arises under the Constitution and laws of the United States, as hereinafter more particularly will appear; involves, exclusive of interest and costs, over ten thousand dollars; is brought to enjoin the collection of certain taxes assessed and levied against the corpo-
9 rate plaintiffs under that Act of the Legislature of North Dakota known as House Bill No. 47, approved March 7, 1919, imposing "a special excise tax with respect to the carrying on or doing business in the state," which tax the plaintiffs allege has been assessed and levied contrary to, and in violation of, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to, and in violation of Section 8, Article 1 of the Constitution of the United States.

VIII.

Paragraph (2) of Section 1 of said House Bill No. 47, defining the basis of tax against corporations, joint stock companies or associations organized under the laws of other states or countries than North Dakota, provides:

"Every corporation, joint stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the

transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint stock company or association furnish to the Tax Commissioner all the information necessary to its computation."

IX.

Before said House Bill No. 47 was passed, all property and franchises of the corporate plaintiffs in North Dakota were taxed under other statutes of the state on the basis of their supposed full value, the said valuation for the year 1917 having been about $97,000,000.00 for the Northern Pacific Railway Company, about $113,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway, about $17,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, and about $52,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company; and for the year 1918 about $90,000,000.00 for the Northern Pacific Railway Company, about $104,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway, about $16,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, and about $48,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. These valuations for both the years 1917 and 1918 are now in litigation in this court, in the cases of Northern Pacific Railway Company v. Charles W. Nelson and others, Great Northern Railway Company v. F. A. Burton and others, Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. F. A. Burton and others, and Farmers' Grain & Shipping Company v. J. A. Kramer and others, for 1917, and Walker D. Hines v. H. J. Sticken and others, for 1918, the plaintiffs contending in said litigations that the total taxable value

of their franchises and railroad property in North Dakota were not in either year in excess,—those of the Northern Pacific of
12 $81,000,000.00, those of the Great Northern of $94,000,000.00, including the Montana Eastern, and those of the Minneapolis, St. Paul & Sault Ste. Marie of $42,500,000.00.

X.

The defendant, George Wallace, having demanded of each of the corporate plaintiffs a return for taxation in compliance with the provisions of House Bill No. 47, each of said corporate plaintiffs filed, in due form, its return with the Tax Commissioner, copy of which is hereto annexed and made a part of this bill and marked exhibits "A," "B," "C" and "D."

The said House Bill No. 47 was adopted from and modeled upon the Acts of Congress imposing an excise tax on corporations with respect to carrying on or doing business. The Acts of Congress had been construed before said House Bill No. 47 was passed as not imposing a tax upon corporations which had ceased to carry on the corporate functions for which they were incorporated, and specifically as not imposing a tax on railroad companies which had leased their railroads or otherwise had ceased to operate them. Since House Bill No. 47 was passed the similar act of Congress now in force has been construed as not imposing a tax on the corporate plaintiffs or on other corporations similarly situated whose property had been taken over by the President in manner before stated.

13 Federal control of the railroads of the corporate plaintiffs ceased March 1, 1920, since which date the corporate plaintiffs have been and now are operating their respective railroads.

XI.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Northern Pacific Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1919 of $19,333.70, and on or about October 15, 1920, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 16th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, further assessed against the Northern Pacific Railway Company, under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1920, of $19,615.85, and on or about October 13, 1920, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant, Obert A. Olson, State Treasurer, who transmitted the same to said company

on or about the 18th day of October, 1920, and demanded payment thereof.

14 The defendant, George Wallace, as State Tax Commissioner, assessed against the Great Northern Railway Company, under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1919 of $21,147.89, and the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant, Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 15th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner further assessed against the Great Northern Railway Company, under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1920 of $20,728.37, and the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant, Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 13th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Chicago, Milwaukee & St. Paul Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1919 of $5,222.81, and on or about October 15, 1920, the defendant,

15 Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 16th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, further assessed against the Chicago, Milwaukee & St. Paul Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1920 of $4,500.33, and on or about October 13, 1920, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 18th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company under the pretended authority of House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1919 of $9,655.39, and on or about October 15, 1920, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 15th day of October, 1920, and demanded payment thereof.

16 The defendant, George Wallace, as State Tax Commissioner, further assessed against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company under the pretended authority of House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1920 of $8,989.02, and on or about October 15, 1920, the defendant Carl R. Kositzky, as State Auditor, drew his draft on the said Company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 15th day of October, 1920, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Montana Eastern Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return as aforesaid, a tax for the fiscal year 1919 of $209.25, and the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 15th day of October, 1920, and demanded payment thereof.

XII.

The special facts as to the assessments against the Northern Pacific Railway Company are alleged to be as stated below, and the word "plaintiff" wherever used herein means Northern Pacific Railway Company.

17 (*a*) The said assessments were arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $377,216,626.00, and deducted therefrom the sum of $100,949,455.90, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $276,267,170.10, he determined to be the taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 14%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $38,677,403.00; deducting legal exemption of $10,000.00, the fifty cents per $1,000 tax for the year 1919 was laid on the balance, $38,667,403.00.

The defendant, George Wallace, further determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1919 to be $378,092,828.69, and deducted therefrom the sum of $97,794,973.18, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $280,297,855.51, he determined to be the taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State

of North Dakota to the total value of its railroad property
18 to be 14%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $39,241,-699.00; deducting legal exemption of $10,000.00. the fifty cents per $1,000.00 tax for the year 1920 was laid on the balance, $39,231,-699.00.

(*b*) Whilst the plaintiff was not operating during the taxable years 1918 and 1919 its railway or railway property, the operation thereof by the Director General of Railroads realized during those years a total railway operating revenue from local business in North Dakota of $2,589,102.84 for 1918 and $3,494,547.94 for 1919, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $14,124,687.92 in 1918 and $12,886,396.09 in 1919, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was $102,908,259.47 in 1918 and $100,-739,353.93 in 1919.

XIII.

The special facts as to the assessments against the Great Northern Railway Company are alleged to be as stated below, and the word "plaintiff" wherever used herein means Great Northern Railway Company.

19 (*a*) The said assessments were arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $377,672,369.67, and deducted therefrom the sum of $58,383,421.33, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $319,288,948.34, he determined to be the taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 13.25%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $42,305,785.66; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1919 was laid on the balance, $42,295,785.66.

The defendant, George Wallace, further determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1919 to be $370,041,981.29, and deducted therefrom the sum of $57,085,461.66, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $312,956,519.63, he determined to be the taxable value of plaintiff's stocks and bonds as representing

the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the
20 State of North Dakota to the total value of its railroad property to be 13.25%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $41,466,738.85; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1920 was laid on the balance, $41,456,738.85.

(*b*) Whilst the plaintiff was not operating during the taxable years 1918 and 1919 its railway or railway property, the operation thereof by the Director General of Railroads realized during those years a total railway operating revenue from local business in North Dakota of $2,487,490.20 (including the Montana Eastern) for the year 1918, and $2,960,455.16 for the year 1919, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $14,767,973.26 in 1918, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was in the same year $100,661,066.74 (including the earnings from subsidiary companies in Canada, the entire capital stock of which is owned by the plaintiff), and amounting, in 1919, to $16,385,766.40, whilst the total railway operating revenue from all transportation on plaintiff's said railway in the same year was $106,553,738.98.

21 The Montana Eastern Railway Company has never operated its railway properties. To date its sole activities have been that of the creation of its railway properties. When any of its railway lines were ready for operation the same were turned over to the Great Northern Railway Company for operation and said lines have been operated by the Great Northern as a part of its system.

The amount of business located in North Dakota (as heretofore stated) done by the Director General on the Great Northern lines, includes local business done on the lines of the Montana Eastern Railway Company.

XIV.

The special facts as to the assessments against the Chicago, Milwaukee & St. Paul Railway Company are alleged to be as stated below, and the word "plaintiff", wherever used herein, means Chicago, Milwaukee & St. Paul Railway Company.

(*a*) The said assessments were arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $441,552,988.00, and deducted therefrom the sum of $25,000,000.00, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $416,558,988.00, he determined to be the taxable

value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the
22 ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 2.51%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $10,455,630.00; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1919 was laid on the balance, $10,445,630.00.

The defendant, George Wallace, further determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1919 to be $379,990,987.00, and deducted therefrom the sum of $21,000,000.00, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $358,990,987.00, he determined to be the taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 2.51%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $9,010,673.00; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1920 was laid on the balance, $9,000,673.00.

(*b*) Whilst the plaintiff was not operating during the taxable years 1918 and 1919 its railway or railway property, the
23 operation thereof by the Director General of Railroads realized during those years a total railway operating revenue from local business in North Dakota of $147,607.07 for 1918 and $273,991.49 for 1919, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary, a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $2,839,639.03 in 1918 and $3,655,751.13 in 1919, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was $132,894,454.65 in 1918 and $150,370,394.27 in 1919.

XV.

The special facts as to the assessments against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company are alleged to be as stated below, and the word "plaintiff" wherever used herein means Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

(*a*) The said assessments were arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $142,012,484.00, and deducted therefrom the sum of $17,738,219.00, the estimated value of all outside securities and physical

property of plaintiff not used in connection with railroad operation; the remainder, $124,274,265.00, he determined to be the
24 taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 15.5%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $19,320,770.00; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1919 was laid on the balance, $19,310,777.00.

The defendant, George Wallace, further determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1919 to be $125,081,639.00, and deducted therefrom the sum of $21,460,905.00, the estimated value of all outside securities and physical property of plaintiff not used in connection with railroad operation; the remainder, $103,620,734.00, he determined to be the taxable value of plaintiff's stocks and bonds as representing the value of plaintiff's railway operating property; he then determined the ratio of the value of plaintiff's property within the State of North Dakota to the total value of its railroad property to be 16.4%, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $16,988,031.60; deducting legal exemption of $10,000.00, the fifty cents per $1,000.00 tax for the year 1920 was laid on the balance, $16,978,031.00.

25 (*b*) Whilst the plaintiff was not operating during the taxable years 1918 and 1919 its railway or railway property, the operation thereof by the Director General of Railroads realized during those years a total railway operating revenue from local business in North Dakota of $1,164,394.03 for 1918 and $1,334,177.53 for 1919, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $4,678,031.43 in 1918 and $5,871,649.56 in 1919, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was $35,995,292.81 in 1918 and $42,661,595.46 in 1919.

XVI.

If said House Bill No. 47, properly construed, imposes a tax in respect portion to the property of each corporate plaintiff actually in use for the transaction of local business in North Dakota, the tax should be determined by the proportion of said local business to the total business, and the railway operating revenues from local business in the taxable years were, as before shown, of the Northern Pacific Railway Company, for 1918, $2,589,102.84, and for 1919 $3,494,547.99, of the Great Northern Railway Company, for 1918

$2,487,498.20, and for 1919, $2,960,455.16 (including the Montana Eastern), of the Chicago, Milwaukee & St. Paul Rail-
26 way Company, for 1918, $147,607.07, and for 1919, $273,-991.49, and of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, for 1918, $1,164,394.03, and for 1919, $1,334,-177.53, whilst the railway operating revenues from the total property of said plaintiffs were, of the Northern Pacific Railway Company, for 1918, $102,908,259.47, and for 1919, $100,739,353.93, of the Great Northern Railway Company, for 1918, $100,661,066.74, and for 1919, $106,562,144.76 (including the earnings from subsidiary companies in Canada, the entire capital stock of which is owned by the plaintiff), of the Chicago, Milwaukee & St. Paul Railway Company, for 1918, $132,894,454.65, and for 1919, $150,370,-394.27, and of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, for 1918, $35,995,292.81, and for 1919, $12,661,-595.48. The local business within the state of each plaintiff corporation during each taxing period was easily and certainly separable from its entire business, and the mount of local business and the amount of entire business was as to each of said plaintiffs easily and certainly ascertainable. If the said House Bill No. 47 be construed to impose a tax in proportion to property actually invested in the transaction of local business within the state, the basis of tax for the Northern Pacific Railway Company for the year 1918 would be 2.5 per cent, and for the year 1919, 3.468 per cent of the total value of its stocks and bonds determined as aforesaid, instead of 14 per cent, and for the Great Northern for the year 1918 the
27 basis of the tax would be 2.47 per cent and for the year 1919 2.77 per cent of the total value of its stocks and bonds determined as aforesaid, instead of 13.25 per cent, and for the Chicago, Milwaukee & St. Paul Railway Company the basis of the tax would be for the year 1918 .11 per cent, and for the year 1919, .18 per cent of the total value of its stocks and bonds, instead of 2.51 per cent, and for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company the basis of the tax would be for the year 1918, 3.2 per cent, and for the year 1919, 3.1 per cent of the total value of its stocks and bonds, instead of 15.5 per cent for 1918 and 16.4 per cent for 1919.

On the other hand, if the Act is to be construed as the defendants have construed it, that is, as imposing a tax on that proportion of the total stocks and bonds representing the value of each corporate plaintiff's railway operating property, which the value of each corporate plaintiff's railway property within the State of North Dakota bears to the value of its entire railway operating property, then the said assessments impose a tax upon the plaintiffs for the privilege of using in the State of North Dakota property devoted to commerce among the states and with foreign nations and a tax on such commerce in violation of Section 8 Article 1 of the Constitution of the United States. The tax complained of is based on the total property investment of the corporate plaintiffs within North Dakota, both that incident to local commerce within the state and that incident to com-

merce among the states and with foreign nations. Moreover,
28 as by the laws of North Dakota the corporate plaintiffs have no right to withdraw from local business and decline to transport it, the tax thereby becomes one on commerce among the states and with foreign nations, in violation of Section 8 Article 1 of the Constitution of the United States.

XVII.

By the terms of the said House Bill No. 47 all moneys collected under the Act are payable into the state treasury to be used for defraying the general expenses of the state government, and plaintiffs are informed and believe that by the law of North Dakota no suit lies against the state to recover illegal taxes once paid. The remedy of suit against the Treasurer personally is too uncertain to be adequate. If the tax is not paid within thirty days after demand, a penalty of ten per cent thereof immediately accrues and thereafter a penalty of one per cent for each month while the tax remains unpaid. Such delinquent tax is made by the Act a first lien upon all and singular the property, assets and effects of each of the corporate plaintiffs in North Dakota, taking precedence over all other demands and judgments against said property. Hence the delinquent tax becomes a lien and cloud on the title to each of the said plaintiff's real property, taking precedence over all other liens and claims, including their mortgages. The Act also authorizes the Attorney General, in case the tax is unpaid, to institute pro-
29 ceedings for the collection thereof with penalty, by sale of the said property or otherwise, and the Act makes it the duty of the Attorney General to enter such proceedings on the certification of the State Auditor that the tax is due and unpaid thirty days after demand, which demand has already been made. Unless the defendants are enjoined as herein prayed, the Attorney General will take such proceeding. When the tax shall have been delinquent for ninety days as shown by the certificate of the Tax Commissioner, the Act makes it the duty of the Secretary of State to cancel the registration of each of said corporate plaintiffs and to notify it that all its privileges under the laws of the state are suspended until such tax, together with all penalties provided in the Act, has been paid. Unless enjoined as herein prayed, the Secretary of State will cancel the registration and authority of each of the plaintiffs to do business within the state.

XVIII.

Wherefore, inasmuch as the plaintiffs are remediless by the strict rules of the common law and are only relievable in equity, the plaintiffs pray:

That the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall may be required to make full and true answer to this Bill of Complaint (but not under oath, answer under oath being expressly waived);

That the said assessments and taxes be declared null and void;

That the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, and each of them, may be perpetually enjoined and restrained from the collection of, or any attempt to collect the taxes herein described, or any thereof, or from entering any proceedings to enforce the same or the penalties described against the property of any of the plaintiffs or otherwise, and that the defendant, Thomas Hall, be perpetually enjoined and restrained from cancelling the registration of each of the plaintiffs or otherwise interfering with its license and privilege to carry on business within North Dakota; and that a temporary restraining order be issued during the pendency of this action restrining the defendants and each of them as prayed;

That plaintiffs may have such other and further relief in the premises as the nature of the case shall require, and to Your Honors shall seem meet; and may it please Your Honors to grant also to plaintiffs a writ of subpœna to be directed to the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, and each of them, commanding them, and each of them, to appear and make answer to plaintiffs' Bill of Complaint at a certain time, and to abide the further order of the Court.

Dated November 10, 1920.

JOHN BARTON PAYNE,
Director General of Railroads,
By M. L. COUNTRYMAN,
D. F. LYONS,
H. H. FIELD,
J. L. ERDALL,
C. J. MURPHY,
Grand Forks, N. D.;
N. C. YOUNG,
Fargo, N. D.,
Solicitors for Plaintiffs.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
Solicitor.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY,
Solicitor.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By BURTON HANSON,
Solicitor.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By H. B. DIKE,
Solicitor.

MONTANA EASTERN RAILWAY COMPANY,
By E. C. LINDLEY, *Solicitor.*

32 STATE OF MINNESOTA,
County of Ramsey, ss:

Charles Donnelly, being duly sworn, deposes and says he is the Executive Vice President of the Northern Pacific Railway Company, one of the plaintiffs in the above entitled Bill of Complaint; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the allegations of the same pertaining to the Northern Pacific Railway Company are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

CHARLES DONNELLY.

Subscribed and sworn to before me this tenth day of November, 1920.

[Notarial Seal.] EARLE W. McELROY,
Notary Public, Ramsey County, Minnesota.

My commission expires February 23, 1925.

33 STATE OF MINNESOTA,
County of Ramsey, ss:

E. C. Lindley, being duly sworn deposes and says he is Vice President of the Great Northern Railway Company and Vice President of the Montana Eastern Railway Company, plaintiffs in the above entitled Bill of Complaint; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the allegations of the same pertaining to the above named companies are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes them to be true.

E. C. LINDLEY.

Subscribed and sworn to before me this tenth day of November, 1920.

[Notarial Seal.] EARLE W. McELROY,
Notary Public, Ramsey County, Minnesota.

My commission expires February 23, 1925.

34 UNITED STATES OF AMERICA,
Northern District of Illinois,
County of Cook, ss:

J. Welch, being first duly sworn, deposes and says that he is an officer, to-wit: Assistant Comptroller of the Chicago, Milwaukee and St. Paul Railway Company, one of the plaintiffs in the above entitled suit; that he has read so much of the Foregoing Bill of Complaint as pertains to the Chicago, Milwaukee and St. Paul Railway Com-

pany and knows the contents thereof and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be -rue.

J. WELCH.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[Notarial Seal.] W. D. MILLARD,
Notary Public.

35 STATE OF MINNESOTA,
County of Hennepin, ss:

C. W. Gardner, being duly sworn, deposes and says that he is the Comptroller of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, one of the plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same, pertaining to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, are true to his own knowledge, except as to matters expressly stated therein upon information and belief, and as to those matters he believes it to be true.

C. W. GARDNER.

Subscribed and sworn to before me this 8th day of November, 1920.

[Notarial Seal.] ALFRED O. BJORKLUND,
Notary Public, Hennepin County, Minn.

My commission expires Nov. 17, 1922.

36 Indorsed on back as follows: "Bill of Complaint." "Filed Nov. 12, 1920. J. A. Montgomery, Clerk."

Answer.

(Title of Case.)

The Answer of George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, Defendants in the Above-entitled Action to the Bill of Complaint Exhibited Against Them by the Above-named Plaintiffs.

I.

Defendants admit that the plaintiff. John Barton Payne, Director General of Railroads, is a citizen and resident of the State of Illinois; that the Northern Pacific Railway Company is a corporation, created and existing under and by virtue of the laws of the State of

Wisconsin; that the Great Northern Railway Company is a corporation created and existing under and by virtue of the laws of the State of Minnesota; that the Chicago, Milwaukee & St. Paul Railway Company is a corporation created and existing under and by virtue of the laws of the State of Wisconsin; that the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is a consolidated corporation created and existing under and by virtue of the laws of the states of Michigan, Wisconsin, Minnesota and North Dakota; that the Montana Eastern Railway Company is a corporation created and existing under and by virtue of the laws of the State of Montana; that George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall are citizens of the State of North Dakota, and are residents within said State.

37

II.

Further answering, defendants admit that by proclamation dated December 26th, 1917, the President, acting under the powers conferred on him by the Constitution and Laws of the United States, by the joint resolution of the Senate and House of Representatives, bearing date April 6th and December 7th, 1917, respectively, and particularly under the powers conferred by Section 1 of the Act of Congress approved August 29th, 1916, and entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at twelve o'clock noon on December 28th, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Northern Pacific Railway Company, the Great Northern Railway Company, the Chicago, Milwaukee and Saint Paul Railway Company, the Minneapolis, St. Paul & Saulte — Marie Railway Company, and the Montana Eastern Railway Company, and the appurtenances thereof, and directed the possession, control, operation and utilization of the transportation systems thus taken should be exercised by and through W. G. McAdoo, appointed Director General of Railroads.

III.

Further answering, defendants admit that the Congress of the United States, by an Act approved March 21-t, 1918, authorized the President to enter into agreements with the Companies owning the railroad systems taken over, for the maintenance and upkeep of the same during the period of Federal control, for a determination of the rights and obligations of the parties to such agreements, arising from or out of Federal control; and the President by proclamation dated March 29th, 1918, acting under said Act approved
38 March 21st, 1918, and by other powers him thereto enabling, authorized the Director General either personally, or through such divisions, agencies or persons as he might appoint, and in his own name, or in the name of the President, to agree with the companies, or any of them, owning such railroads and transportation

systems, and to make any and all contracts, agreements or obligations necessary or expedient in connection with Federal control of systems of transportation, as fully in all respects as the President is authorized to do.

IV.

Further answering, defendants admit that thereafter, W. G. McAdoo, Director General of Railroads, by virtue of the power and authority conferred on him as aforesaid, did enter into certain agreements in writing with the transportation companies herein, wherein and whereby it is provided in each of said agreements that the Director General shall either pay, out of the revenue derived from railway operation during the period of Federal control, or shall save the *the* company harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenue derived from operation, and all other taxes which under the accounting rules of the Interstate Commerce Commission, in force December 31, 1917, are properly chargeable to "Railway Tax Accruals," that said agreements and each of them were in full force and effect when the taxes complained of herein accrued.

V.

Further answering, defendants admit that thereafter said W. G. McAdoo, having resigned as Director General of Railroads and the plaintiff, John Barton Payne, having been duly appointed by the President to succeed the said W. G. McAdoo, the plaintiff, John Barton Payne, did succeed to and was in possession of all the powers and authority formerly exercised and enjoyed by the said W. G. McAdoo, Director General of Railroads.

39 VI.

Further answering, defendants admit that the Northern Pacific Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Duluth, Minnesota; Superior, Wisconsin, and St. Paul, Minnesota, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and British Columbia, to Puget Sound and Pacific Coast ports.

That the Great Northern Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Duluth, Minnesota; Superior, Wisconsin, and St. Paul, Minnesota, extending westerly from said termini through the states of Minnesota, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, and British Columbia to Puget Sound and Pacific Coast ports;

That the Chicago, Milwaukee & St. Paul Railroad is a transportation system consisting of railway lines and branches, having their

eastern terminus, at Chicago, Illinois, and extending northerly, northwesterly and westerly through the states of Illinois, Michigan, Wisconsin, Iowa, Missouri, Minnesota, Nebraska, North Dakota, South Dakota, Montana, Idaho, and Washington to Puget Sound and Pacific Coast ports;

That the Minneapolis, St. Paul and Sault Ste. Marie Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Sault Ste. Marie, Michigan and Chicago, Illinois, and extending westerly from said termini through the states of Wisconsin, Minnesota, North and South Dakota, and into the State of Montana;

That the Montana Eastern Railroad is a transportation system consisting of a railway line extending from Snowdon, Montana, to Richley, Montana, with a branch line running from Fairview, on or near the boundary line between the states of Montana and North Dakota, easterly to Watford City, North Dakota;

That the said corporate plaintiffs were all chartered as railroad companies, and their railways now, and during the calendar year 1918, when in control of the said Director General of Railroads, and operated by him, have been devoted to the transportation of passengers and goods, both state and interstate, and have been and now are instrumental-ties of interstate commerce; and that said corporate plaintiffs before the year 1918 duly complied with all the laws of North Dakota, imposing requirements with respect to the doing of business, owning of property, and suing and being sued in that state, and before the year 1918 were, and have since continued to be, duly licensed and privileged to carry on business within the state, authorized by their charters and the laws thereof.

VII.

Further answering, defendants admit that the defendants are officers of the state of North Dakota, duly qualified and acting as such; that George Wallace is the State Tax Commissioner; that Obert A. Olson is the State Treasurer; that Carl R. Kositzky is the State Auditor; that William Langer is the Attorney General, and that Thomas Hall is the Secretary of State.

VIII.

Further answering, defendants admit that this suit involves the jurisdictional sum or value.

IX.

Further answering, defendants deny that this is a suit in equity between the plaintiffs and the defendants; that it arises under the constitution and laws of the United States; that the taxes assessed and levied against plaintiffs under the Act of *of* the Legislature, known as House Bill No. 47, approved March 7, 1919, imposing a special

excise tax with respect to the "carrying on or doing business
41 in the state," is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and contrary to and in violation of Section 8, Article 1 of the Constitution of the United States.

X.

Further answering, defendants admit that paragraph two of Section 1, of said House Bill No. 47, defines the basis of the tax against corporations, joint stock companies or associations, organized under the laws of other states or countries than North Dakota, but engaged in business in the state during the previous calendar year.

XI.

Further answering, defendants admit that all property and franchises of corporate plaintiffs were taxed under other statutes of the state on the basis of their supposed full value before and at the time said House Bill No. 47 was passed, and have been so assessed and taxed at all times since.

XII.

Further answering, defendants admit that the said valuation for the year 1917 was about $97,000,000.00 for the Northern Pacific Railway Company; about $113,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway; about $17,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, and about $52,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company; and for the year 1918 about $90,000,000.00 for the Northern Pacific Railway Company; about $104,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway; about $16,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, and about $48,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company; that said taxes are now in litigation in this court, in which the state is defending said valuations for purposes of general property taxation.

42 XIII.

Further answering, defendants deny that a fair value for purposes of general property tax in North Dakota of the franchises and railroad property is not in excess of $81,000,000.00 for the Northern Pacific; $94,000,000.00 for the Great Northern, including the Montana Eastern; and the Minneapolis, St. Paul & Sault Ste. Marie at $42,500,000.00.

XIV.

Further answering, defendants admit that George Wallace, demanded and received a return from each of the corporate plaintiffs

herein, being reports in compliance with the provisions of said House Bill No. 47.

XV.

Further answering, defendants neither admit nor deny the allegation that said House Bill No. 47 was adopted from and modeled upon the Acts of Congress in imposing an excise tax on corporations with respect to carrying on or doing business, as they have no knowledge or information concerning the same.

XVI.

Further answering, defendants admit that George Wallace State Tax Commissioner, assessed against the corporate plaintiffs herein under the authority of said House Bill No. 47, and the defendant, Carl R. Kositzky, as State Auditor, draw his draft on said plaintiffs and delivered the same to the defendant, Obert A. Olson, State Treasurer, who transmitted the same on or about the 15th day of October, 1920, in the sums alleged in paragraph 11 of plaintiffs' bill.

XVII.

Further answering, defendants admit that the defendant, George Wallace, accepted as a fair average value of the capital stocks and bonds of the plaintiffs for the calendar years 1918 and 1919, the various sums set forth in Sections 12, 13, 14 and 15 of Plaintiff's Bill; that he pro-rated the sums so found to the State of North
43 Dakota upon the percentum which the property of the railway company in the state of North Dakota bore to the total property of the railway company, both within and without the state; that he deducted from the sum so derived $10,000.00, the exemption provided by said House Bill No. 47, and levied a tax of fifty cents per thousand dollars upon the remainder.

XVIII.

Further answering, defendants allege that George Wallace, State Tax Commissioner, in arriving at the actual value of the stocks and bonds of these plaintiffs, accepted the values contained in their reports to him under the provision of said House Bill No. 47; that he accepted that ratio which the property of the corporation both within and without the state of North Dakota as set forth in reports to him by said corporate plaintiffs; that in arriving at the North Dakota share of said stocks and bonds, he took into consideration the terminals owned by said corporate plaintiffs lying wholly without the State of North Dakota, the more expensive tracks in mountainous and other regions, their several land grants, bond issues secured upon mortgages upon their property lying without the state, and made every legal exemption to which said corporate plaintiffs were entitled; that the tax levied upon the said corporate plaintiffs was in

pursuance of the provisions of House Bill No. 47, and legally assessed the same against them, and that said taxes are not repugnant to any provision or provisions of the constitution of the United States.

XIX.

Further answering, defendants allege that said Tax Commissioner, George Wallace, properly construed the provision of House Bill No. 47, which requires the distribution of the fair value of stocks and bonds of corporate plaintiffs to the state of North Dakota, in that proportion which the property of the corporation within the state bears to the total property of the corporation, both within and without the state.

44

XX.

Further answering, defendants allege in the alternative that if the construction placed upon said House Bill No. 47 by said George Wallace is not the true construction, then the said actual value of the stocks and bonds of said corporation should be prorated to the state of North Dakota upon that ratio which the business done within the state of North Dakota by said corporation bears to all the business done both within and without the said state by said corporation.

XXI.

Further answering defendants allege that the tax provided by House Bill No. 47 is an excise tax upon the right of a corporation to be and exist and to exercise its corporate powers within the state; that it is measured by the property of said plaintiff corporation within the state as arrived at by the provisions of said House Bill No. 47, and that it is not a tax upon the property without the State nor is it a burden upon interstate commerce.

XXII.

Further answering, defendants admit that, as provided by said House Bill No. 47, the tax becomes delinquent as alleged in paragraph 17 of plaintiffs' Bill, and that unless paid, the Attorney General will cause its property to be distrained in payment thereof.

XXIII.

Further answering, defendants allege that the corporate plaintiffs herein have not at any time made tender or offered to pay the taxes set forth in paragraph 11 of plaintiff's bill.

XXIV.

Further answering, defendants deny that plaintiffs are entitled to any relief whatsoever or any part of the relief in said bill of com-

plaint demanded, and alleges that plaintiffs have no standing in this court or any court of equity.

45 XXV.

Further answering, defendants deny any and all manner of unlawful acts whatsoever, whereof it is in any wise by the said bill of complaint charged; all of which matters and things these defendants are ready and willing to prove as this honorable court shall direct.

XXVI.

Further answering, defendants pray in all things the same benefit and advantages of this, their answer, as if they had pleaded or demurred to said bill of complaint.

Wherefore and in consideration of which these defendants pray: that plaintiff's prayer for a temporary restraining order to issue against these defendants be denied; that the plaintiffs' bill of complaint be dismissed; that they be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM LANGER,
Attorney General for the State of North Dakota.
Solicitor for Defendants.

F. E. PACKARD,
Asst. Atty. Genl. for the State
of North Dakota, of Counsel.

Indorsed on back as follows: "(Title of Case). Answer. Filed Dec. 16, 1920, J. A. Montgomery, Clerk." "Service of the within Answer, by receipt of a true and correct copy thereof, is hereby admitted this 15th day of December, 1920. Miller, Zuger & Tillotson, Attorney- for Plaintiffs."

46 (Title of Case.)

Memorandum Opinion.

This suit in equity is brought by John Barton Payne, Director General of Railroads, and five railway companies, against state officials of North Dakota, to restrain the collection of a special excise tax levied pursuant to an act of the 1919 legislature referred to as House Bill No. 47, which tax the plaintiffs allege has been assessed and levied without statutory authority, and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to and in violation of Section 8, Article 1 of the Constitution of the United States.

The relevant provisions of the statute in question are as follows:

"Every corporation, joint stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and
47 certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be only if such corporation, joint stock company or association furnish to the Tax Commissioner all the information necessary to its computation."

In the first instance state officials caused the excise tax to be levied in amounts based upon the proportion which the mileage of the respective railroads within the state bore to their entire mileage within and without the state. This was done in accordance with the language of the proviso, "Provided, that in the case of a railroad having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state."

A preliminary injunction against the collection of the tax so arrived at was sustained by the Supreme Court of the United States on the ground that it appeared to be an unwarranted interference with interstate commerce, and a taking of property without due process of law. Wallace vs. Hines, May 3, 1920.

Thereupon the present tax was assessed upon a certain percentage of the total value of each corporation's property, (less securities and properties not used in railroad operation), the percentage being the

ratio of the value of the corporations' property in North Dakota to such total value.

48 A preliminary injunction by three judges was issued herein against the tax as now laid, but no opinion was written, and the matter is now heard upon the bill and answer.

The decision of the Supreme Court in the former injunction suit concerning the excise taxes which were originally levied under House Bill No. 47, settles the jurisdictional questions presented by the pleadings and it is encumbent on this court to determine the controversy on the merits.

The argument is made in limine that the excise tax provided by the statute was not assessable during the period of government control and operation. This contention is overruled; first, because it was necessarily involved and before the Supreme Court in the former suit, and does not appear to have been sustained; second, because the act of Congress and the proclamation of the President under which the operation of the railroads was taken over by the government, do not indicate any intention on the part of the government to deprive the several states of the revenues normally accruing to them by reason of the existence and operation of the railroads within their borders.

Another contention is that because the mileage ratio provision of the statute as applied was unconstitutional, therefore the tax must wholly fail as to the railroads. It was not the intention of the Supreme Court to so decide, and the contention should be overruled. The unconstitutional part of the statute is separable from the remaining provisions, and was not the inducement upon which the legislation was enacted.

The real gist of the controversy upon which the decision turns is whether the value of the intra-state property should be used to get the percentage of total value for this tax assessment, or whether the proper factors are the amounts of gross returns from intra-state business and total business. Obviously in a state like North Dakota a larger percentage and correspondingly greater amount of tax can be obtained if the ratio is between intra-state and total property values, because the intra-state commerce is small compared to the interstate commerce that passes into and across the state; but the properties and the capital investment of the railroads are on

49 scale of cost and value necessary to carry the interstate commerce.

The imposition of the tax upon the basis of the value of the railroad property within the state is not contrary to or in violation of Section 1 of the Fourteenth Amendment to the Constitution, and is not contrary to or in violation of Section 8, Article 1 of the Constitution of the United States.

St. Louis, &c., Ry. Co. v. Ark., 235 U. S., 350.

In that case the court said, quoting Mr. Chief Justice Fuller in the case of Postal Tel. Cable Co. v. Adams, 155 U. S., 688:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived

therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belong to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

The more serious question is the construction of the second section of the statute which is the sole authority and justification for the tax. The tax as it has been laid rests upon the amount and value of each corporation's property within the state which is used in the exercise of the corporate franchise within the state. This appears to be clearly within the spirit and expressed purpose of the statute. That purpose is to make the tax commensurate with the amount of the corporation's capital investment within the state. That investment is subject to direct ad valorem tax, and likewise the corporation can lawfully be subjected to excise tax on account of the application of the capital investment to corporate uses within the state.

Taking up the section of the statute in detail: The first
50 provision clearly discloses the general purpose to measure the excise tax by the capital actually invested in the transaction of business in the state. The next clause is that "investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state."

The plaintiffs insist that the phrase in this clause, "business within the state" must be given a very narrow meaning and must be taken to signify only the gross intra-state receipts. When so construed the corporate use of a large part of the actual "investment within the state" escapes the tax and such construction seems to defeat the general purpose to make the amount of the investment within the state the standard for measuring the amount of the tax. The narrow meaning contended for by the plaintiffs ought not to be given to the phrase when the obvious result is to defeat the general legislative purpose. The reference in the phrase, "business within the state," is to the entire business carried on within the state and not merely to gross receipts from strictly intra-state business. The tax can be assessed under this clause only when the entire business carried on by the branch of the corporation within the state is easily and certainly separable from the entire business within and without the state.

Such is not the case with the railroads. Any attempt to measure

an excise tax upon their investment within the state by such a standard would surely run counter to the constitutional limitations.

The next succeeding clause in the section is the one properly applicable to the railroads: "Where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the
51 state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state."

This clause seems to provide the only fair and constitutional method to determine the excise tax on the railroads consonant with the general purpose of the act. It is the method that has been followed and the tax as assessed and levied ought not to be enjoined.

It is therefore

Ordered, that the bill be dismissed at plaintiffs' costs, and that the temporary injunction be dissolved.

Dated March 11, 1921.

J. W. WOODROUGH,
Judge.

Indorsed on back as follows: "Opinion of Court. Filed Mar. 11, 1921. J. A. Montgomery, Clerk."

52 *Decree.*

Entered March 11th, A. D. 1921.

(Title of Case.)

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon due consideration, it was

Ordered, adjudged and decreed that the bill of complaint be and the same hereby is dismissed; and it was further

Ordered that the temporary injunction issued herein be and the same hereby is dissolved; and it was further

Ordered, adjudged and decreed that the defendants have and recover of the plaintiffs herein their costs and disbursements herein taxed and allowed by the Clerk of this Court at the sum of $—, and have execution therefor.

53 *Petition for Appeal and Order Allowing Same.*

(Title of Case.)

The above named plaintiffs, conc*ie*ving themselves aggrieved by the final decree entered March 12, 1921, dismissing plaintiffs' bill of *aon*plaint and dissolving the temporary injunction heretofore is-

sued, do hereby appeal from said decree to the Supreme Court of the United States and pray that this appeal be allowed.

C. W. BUNN,
M. L. COUNTRYMAN,
D. F. LYONS,
Solicitors for Plaintiffs.

On March 15th, 1921, Ordered that the above appeal be allowed as prayed, and that during the pendency of the appeal the temporary injunction heretofore allowed be restored and continued in effect upon filing by corporate plaintiffs of a bond in the sum of 5,000.00 dollars.

J. W. WOODROUGH,
District Judge.

Endorsed on back as follows: Petition for appeal and order allowing same. Filed Mar. 17, 1921. J. A. Montgomery, Clerk.

54 *Assignment of Errors.*

(Title of Case.)

The above named plaintiffs, in connection with their petition for appeal, file the following assignment of errors;

The Court erred;

1. In decreeing that plaintiffs' bill be dismissed and that the temporary injunction be dissolved.

2. In holding that plaintiff corporations were carrying on or doing business in the state of North Dakota during the years of 1918 and 1919 and were therefore subject to tax levied by the act of the legislature of North Dakota for the year 1919 referred to as House Bill No. 47.

3. In holding that the method followed by the Tax Commissioner in levying the excise taxes here complained of upon the ratio of the value of the plaintiffs' properties within the State of North Dakota to the total value of their properties, both within and without the state, is authorized by the terms of House Bill No. 47.

4. In holding that the taxes complained of did not impose a tax upon the plaintiffs' for the privilege of using in North Dakota property devoted to commerce among the states and with foreign nations and that such tax on such commerce did not violate Section 8 of Article 1 of the Constitution of the United States.

C. W. BUNN,
M. L. COUNTRYMAN,
D. F. LYONS,
Solicitors for the Plaintiffs.

Endorsements: Aiss-gnment of Errors. Filed Mar. 17, 1921. J. A. Montgomery, Clerk.

55 *Bond.*

(Title of Case.)

Know all men by these presents that we, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee and Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company and Montana Eastern Railway Company, as principals, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the above named appellees, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall, in the sum of five thousand dollars ($5,000) to be paid to them and for the payment of which we bind ourselves, our successors and assigns, firmly by these presents.

Signed with our seals and dated this 16th day of March 1921.

The condition of this obligation is such that whereas the appellants, John Barton Payne, Director General of Railroads, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee — Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, and Montana Eastern Railway Company, seek to prosecute their appeal to the Supreme Court of the United States and to reverse the final decree entered in the above entitled cause by the District Court of the United States for the District of North Dakota,

Now therefore, if the above named appellants shall prosecute their appeal to effect and answer all costs and damages that may be adjudged if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal N. P. Ry. Co.]

NORTHERN PACIFIC RAILWAY CO.,
By CHARLES DONNELLY,
President.

[Seal G. N. Ry. Co.]

GREAT NORTHERN RAILWAY CO.,
By G. R. MARTIN,
Vice-President.

[Seal C., M. & S. P. Ry. Co.]

CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY CO.,
By H. E. BRYAN.

[Seal of M., St. P. & S. — M. Ry. Co.]

56 MINNEAPOLIS, SAINT PAUL AND SAULT SAINTE MARIE RAILWAY CO.,
By E. PENNINGTON.

[Seal of M. E. Ry. Co.]

MONTANA EASTERN RAILWAY CO.,
By GEO. H. HESS, JR.,
Comptroller.

[Seal of N. S. Co.]

NATIONAL SURETY COMPANY,
By L. A. GREEN,
Attorney in Fact.

57 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 18th day of March, 1921, before me appeared Charles Donnelly, to me personally known, who being by me duly sworn, did say that he is the President of the Northern Pacific Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors, and said Charles Donnelly acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] L. R. FELLOWS,
Notary Public, Ramsey County, Minn.

My Commission expires April 2, 1925.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of M-rch 1921, before me appeared G. R. Martin, to me personally known, who being by me duly sworn, did say that he is the Vice President of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors, and said G. R. Martin acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] EARLEW McELMY,
Notary Public, Ramsey County Minnesota.

My Commission expires Feb-uary 23, 1925.

STATE OF ILLINOIS,
County of Cook, ss:

On this 19th day of March 1921, before me appeared H. E. Bryan, to me personally known, who being by me duly sworn, did say that he is the President of the Chicago, Milwaukee and Saint Paul Railway Company; that the seal affixed to the for-going instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of

directors, and said H. E. Bryan acknowledged said instrument to be the free act and deed of said corporation.

58 W. D. MILLARD,
Notary Public, Cook County, Illinois.

My Commission expires May 10, 1924.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 16th day of March 1921, before me appeared E. Pennington, to me personally known, who being by me duly sworn, did say that he is the President of the Minneapolis, Saint Paul and Sault Sainte Marie Railway Company; that the seal affixed to the forgoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors, and said E. Pennington acknowledged said instrument to be the free act and deed of said corporation.

ALFRED O. BJORKLUND,
Notary Public, Hennepin County, Minnesota.

My Commission expires Nov. 17, 1922.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of March 1921, before me appeared Geo. H. Hess, Jr., to me personally known, who being by me duly sworn, did say that he is the Comptroller of the Montana Eastern Railway Company; that the seal affixed to the forgoing ins-rument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors, and said Geo. H. Hess, Jr. acknowledged said instrument to be the free act and deed of said corporation.

EARLEW McELMY,
Notary Public, Ramsey County, Minnesota.

My Commission expires Feb-uary 23, 1925.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of March 1921, before me appeared L. A. Green, to me personally known, who being by me duly sworn, did say that he is the Attorney in Fact of the National Surety Company: that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was executed in behalf of said corporation by authority of its board of directors, and said L. A. Green acknowledged said instrument to be the free act and deed of said corporation.

59 G. E. JOHNSON,
Notary Public, Ramsey County, Minn.

My Commission expires Sept. 20, 1924.

Endorsements: Appeal Bond. Filed Mar. 23, 1921. J. A. Montgomery, Clerk.

60 (Title of Case.)

Præcipe.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above case for the use of the United State Supreme Court, by including therein the following:

Bill of Complaint, except Exhibits attached thereto; Answer; Opinion of Court; Judgment; Petition for Appeal and Order Allowing Same; Assignments of Error.

Dated this 18th day of April, 1921.

M. L. COUNTRYMAN,
D. F. LYONS,
YOUNG, CONMY & YOUNG,
Attorneys for Appellants.

Indorsed on back as follows: "(Title of Case.) Præcipe. Filed Apr. 19, 1921. J. M. Montgomery, Clerk."

61 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof pursuant to the order filed in the office of the Clerk of the District Court of the United States for the District of North Dakota, allowing the appeal of the plaintiffs from the final decree entered March 11, 1921, in that certain suit wherein John Barton Payne, Director General of Railroads, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee and Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company and Montana Eastern Railway Company are plaintiffs and appellants and George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall are defendants and appellees, to show cause, if any there be, why the final decree rendered against said appellants in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 21 day of March, 1921.

J. W. WOODROUGH,
District Judge.

62 Service of the within citation is hereby accepted for the defendants herein this 26 day of March, 1921.

WM. LEMKE,
Solicitor.

63 UNITED STATES OF AMERICA,
District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the United States District Court for the District of North Dakota, do hereby certify that the foregoing pages from one to sixty-two contain true and faithful transcripts of all pleadings, process and proceedings of record and on file in my office as said clerk, designated by the appellant- and appellee, and the whole thereof, and the -orsements theeron, in the case of "John Barton Payne, Director General of Railroads, et al., versus George Wallace et al."

Witness my hand and the seal of said District Court of the United States, for the District of North Dakota, at Fargo, in said District, this 10th day of May, A. D. 1921.

[Seal of United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk,

By E. R. STEELE,
Deputy.

Endorsed on cover: File No. 28,283. North Dakota D. C. U. S. Term No. 329. John Barton Payne, Director General of Railroads; Northern Pacific Railway Company, et al., appellants, vs. George Wallace, et al. Filed May 25th, 1921. File No. 28,283.

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 329.

JAMES C. DAVIS, Director General of Railroads, et al.,

Appellants,

vs.

GEORGE WALLACE, ET AL.

BRIEF FOR APPELLANTS.

CHARLES W. BUNN,
E. C. LINDLEY,
M. L. COUNTRYMAN,
D. F. LYONS,
for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 329.

JAMES C. DAVIS, Director General of Railroads, et al.,

Appellants,

vs.

GEORGE WALLACE, ET AL.

This is an appeal from final decree of the District Court of the United States for North Dakota. The suit was brought by the Director General of Railroads joining with the railroad companies, of which he was Director General, having railroads in that state, to restrain collection of an excise tax levied under a state law imposing on corporations "a special excise tax with respect to the carrying on or doing business in the state." The material part of this act reads:

> "Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States

or a foreign country, and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the State; provided, that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital

so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the State shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation."

After a temporary restraining order had been granted by a court of three judges the case was finally heard on bill and answer and the bill was dismissed on its merits by Judge Woodrough, District Judge, and from this judgment the appeal is taken. The tax was laid under authority of an act commonly called House Bill No. 47 (chapter 222, laws N. D. 1919), which imposes on corporations (see section 1) "a special excise tax with respect to the carrying on or doing business in the state."

The railway corporations, appellants, own railways extending into or through North Dakota with only a fraction of their property and operations in that state, and they were chartered under the laws of other states. Consequently this special excise tax was imposed against them under section 1 (2) of the act, which is quoted above and which rates the tax by a certain proportion of the stock and bonds of each corporation. The construction of the statute as to what proportion of the stocks and bonds is prescribed is one important question in the case, and another important question is whether the proportion so determined

by the statute is a valid basis for tax in view of the provsions of the Constitution of the United States. Still another question is whether the corporations during the years 1918 and 1919, while their railways were in federal control, were doing business within the state so as to be subject to the tax.

A previous assessment made against the same corporations for 1918 was held invalid in *Wallace et al. v. Hines, Director General of Railroads, et. al.*, 253 U. S. 66. The assessment in that case was based on a *mileage* proportion of the stocks and bonds and this court held that basis of apportionment invalid without deciding any other question.

Afterwards the state officers assessed on a different basis the tax for 1918, and on the same basis laid a tax for the year 1919, both of which assessments are challenged in this suit.

The bill raised three objections to the taxes: (a) that the companies during federal control were not engaged in business and therefore not subject to this tax, (b) that the basis of apportionment to North Dakota of all the companies' stocks and bonds adopted for the assessment was contrary to the terms of the act properly construed, (c) that this basis, if authorized by the law, rendered the assessment unconstitutional as being in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 8, Article I of the Constitution of the United States.

The District Court had jurisdiction, as shown by the bill, of all the parties both plaintiff and de-

fendant (except the Minneapolis, St. Paul & Sault Sainte Marie Railway Company) on the ground of diverse citizenship (Transcript, fols. 2, 3), and the jurisdiction of the court also was invoked on constitutional grounds (Transcript, fols. 8, 9). The District Court and this court therefore have the right and duty to determine all questions involved, though some of them are purely of state law. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. The first two questions we shall submit are questions of state law. Our contentions were properly assigned as error (Transcript, fol. 54) and may be stated as follows:

The court below erred:

1. In holding that the plaintiff corporations were carrying on or doing business in North Dakota during the years 1918 and 1919.

2. In holding that the ratio of value of property in North Dakota to total value of property adopted for the taxes in question is authorized by the law, properly construed.

3. In holding that the taxes complained of did not tax the privilege of using in North Dakota property devoted to commerce among the states and with foreign nations, violating Section 8, Article I of the Constitution of the United States.

I.

The act imposes "a special excise tax with respect to the carrying on or doing business" by corporations, being a substantial copy in this respect and in many others of the act of Congress imposing a special excise tax on corporations with respect to carrying on or doing business (see Title X of the Revenue Act of Congress 1918, 40 U. S. Stat. p. 1126, and Sec. 407 of the Revenue Act of Congress of 1916, 39 U. S. Stat. 789). Before the North Dakota act passed the act of Congress had been construed in *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, and *McCoach, Collector, v. Minehill Railroad*, 228 U. S. 295, as imposing no tax with respect to corporations not engaged in carrying on the principal business for which they were chartered, but only maintaining their corporate organization, protecting their property, and making distributions to stockholders or creditors of corporate revenue. In the latter case the Minehill Railroad had leased its road, but collected rental and some income from securities. It was held not to be carrying on or doing business.

The plaintiff railway companies and other companies whose railway business and property were taken over by the government, receiving compensation for use in the nature of rental, have been held by the Treasury Department to be in the class of the Minehill Railroad and not subject to the federal excise tax. See Art. 21 Capital Stock Tax Regulations, U. S. Treasury Department.

That the act of North Dakota was modeled on and in substance copied from the act of Congress there can be no doubt. Both acts lay an excise tax on the doing of business in corporate form. The exemptions in the North Dakota act, Sec. 2, are substantially the same as in the act of Congress, and the reports required from corporations by Sec. 3 are substantially alike in the two acts. It is even provided in Sec. 3 (5) of the North Dakota act that the forms and blanks on which returns shall be made shall be similar, in so far as practicable, to those for making returns to the Commissioner of Internal Revenue under the federal act.

It is evident that the North Dakota legislature had before it the act of Congress when it passed this law and intended to tax exactly the same thing which the act of Congress taxed. On the plainest principles the legislature of North Dakota must be held to have adopted the settled interpretations of the act of Congress, among which was the interpretation of this court in *McCoach, Collector, v. Minehill Railroad.*

Nothing in *St. Louis-San Francisco Railway Co. v. Middlekamp,* opinion by Mr. Justice Holmes May 2, 1921, militates against our contention. That case involved a *property tax,* an annual tax on corporate franchises as property, and was levied without respect to whether a corporation was doing business or not, while here we have not a property tax (the corporate property and corporate franchise regarded as property being taxed

under other North Dakota laws) but a special excise tax in respect of the doing of business in corporate form and capacity. What Mr. Justice Holmes says in the Middlekamp case was perfectly true, that the corporation was profiting by its franchise, receiving a substantial compensation from the Director General. But the tax in question is on account of the doing of business, running only against corporations actually carrying on business.

II.

We contend that the state law, properly interpreted, provides in the case of railway companies for assessment on that portion of their stocks and bonds equal to the ratio of their mileage in North Dakota to their total mileage and for no other basis, and that as mileage apportionment has been held illegal the act provides no other basis.

We contend that if the act can be interpreted to provide for railway companies any other basis than mileage that basis is the ratio of local earnings in North Dakota to entire earnings.

The assessment in question was upon the ratio of railway property of these corporations within North Dakota to their entire railway property, and we submit that the law warrants no assessment on that basis.

If the law provides no basis except mileage, that is an end of the case. If the law, properly interpreted, provides any other possible basis than mile-

age, it is the proportion of local earnings in North Dakota to entire earnings. The difference between assessment on the local earnings proportion and on proportion of property is very material. The property ratio results in many times the tax which would follow the ratio of local business to entire business. For example, the ratio adopted for the Northern Pacific was 14 per cent, while its ratio of local business in North Dakota to entire business was between 2 and 3 per cent (Transcript, fols. 17, 18). The Great Northern's property ratio was found by the state officers to be 13.25 per cent, while its local earnings ratio was slightly over 2 per cent (Transcript, fols. 19-21). The Chicago, Milwaukee & St. Paul Company's property ratio was found by the state officers to be 2.51 per cent, while the ratio of its local earnings in North Dakota to its entire railroad earnings was approximately one-twelfth of 1 per cent. The Minneapolis, St. Paul & Sault Sainte Marie Company's property ratio was found by the state officers to be 15.5 per cent, while its local earnings were approximately 3 per cent of its entire railway earnings.

The case was heard on bill and answer and it was shown in the bill and not denied by the answer, that the local business in North Dakota of each railroad was easily and certainly separable from its entire business, and that both the amount of local business and the amount of entire business of each railroad was easily and certainly ascertainable. The bill gives for each year the exact amount in dollars and cents of local business of each com-

pany in North Dakota and these amounts are not disputed by the answer. These undisputed amounts for each year were seasonably returned to the Tax Commissioner as required by the act, both the amount of local business and the total amount of business.

Was the assessment in question upon the proportion of property value authorized by the law? This question turns on the meaning of Sec. 1 (2) of the act above quoted.

The State Tax Commissioner made his first assessment of the railways on basis of their mileage in the state to total mileage. The statute gives one a first impression that the second proviso lays down the only basis on which railways are to be assessed, viz., mileage, and that they do not fall under either branch of the first proviso. But on the assumption that they may fall under the first proviso they certainly come under the first clause thereof.

That clause gives the complete rule for cases which fall within it. If this case falls within the first clause the second clause cannot be resorted to. The first clause says there shall be taken the proportion of "business within the State" to the corporation's "total business within and without the state" in all cases where "such business within the state" is easily and certainly ascertainable and separable from the whole business. It is only where business within the state is not otherwise more easily and certainly separable from the en-

tire business that a proportion of property may be resorted to.

The tax here was based on proportion of property. We say invalidly, because the "business within the state" of each railway company was easily and certainly determinable and separable from its entire business.

And that depends only on whether "business within the state" means local business. The earnings from this business are certainly and easily ascertainable. But if "business within the state" includes some part or proportion of earnings from transportation among the states, then it is not easily or certainly ascertainable or separable from entire business.

As a matter of interpretation "business within the state" should be held to intend only business local to the state because that is the natural meaning of "within the state." Had the legislature intended to include some proportion of interstate business it must have said so and would necessarily have defined what proportion, a proportion based on value of property, miles of road, miles of movement within the state, or on some other basis. And it is a just rule that taxes cannot rest on doubtful interpretations, and reasonable doubts are to be resolved in favor of the tax payer.

Besides, that "business within the state" ordinarily and normally means local business, the expression has been a common one in the tax laws of many states and before the act of North Dakota

was passed had uniformly been interpreted to mean local business only. *Pacific Express Company v. Seibert*, 142 U. S. 339, s. c. 44 Fed. Rep. 310, 316; *State v. Northern Express Co.*, 80 Wash., 313 (141 Pac. Rep. 759).

The act contemplates three possible bases of assessment; (a) business within the state as compared to the whole business, where the business within the state is easily and certainly separable from the whole; (b) property within the state as compared to the whole property, where business within the state is not otherwise more easily and certainly separable from the whole; (c) a further proviso that in case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, having lines that enter into, or extend out across the state, property within the state shall be determined by the proportion of mileage within the state to the whole.

Basis (c), that is the mileage proportion, has been held invalid as to the carriers in question. There is strong ground for contending that this is the only basis applicable to railroad companies, and if that contention is sustained the assessment in question is not warranted by the law. But in case that contention is not sustained we submit that the act requires assessment to be made under the first clause of the proviso, that is on basis (a) above stated, and that the assessments in question, based on the proportion of property within the state to the whole property, have no support in the law.

It was alleged in the bill and admitted in the answer (Transcript, fols. 11-41) that all property and franchises of these railways were taxed under other statutes of the state, on the basis of their supposed full value, before and at the time House Bill 47 was passed, and that they have been so assessed and taxed at all times. This tax is not therefore a property tax and in the strictest sense is a special excise tax for the privilege of doing business in corporate form. The learned District Judge failed to realize this. He said very correctly that property of these corporations used for the purpose of interstate commerce is taxable by the state. There is and has been no dispute as to this. Were the tax in question a property tax, the District Judge would have been quite right in saying that the property of each corporation within the state is justly subject to the tax and ought not to escape through any strict or narrow interpretation of the law (Transcript, fols. 49-51). It is a mistaken view that the interpretation of the act we contend for will result in the railways escaping taxation. The fact that the legislature of North Dakota did not intend in this act to tax property or franchises, which were already fully taxed, but only to impose a privilege tax with respect to carrying on "business within the state" strongly supports our contention that "business within the state" means as applied to railroads the business moving wholly within the state.

The two contentions heretofore urged are questions of state law. This court would doubtless pre-

fer to follow the state court on such questions, but in the absence of any ruling of a state court on either question, must decide for itself, without the guide of state decisions, whether the appellant corporations were engaged in business within the meaning of the act, and whether by the terms of the act they were properly assessed in proportion to their property within the state compared to their total railway property.

III.

We contend, finally, that if the North Dakota act authorizes a tax on the basis adopted by the state officers for this assessment, it operates as a tax on the privilege of doing interstate and foreign commerce in North Dakota and violates Section 8, Article 1 of the Constitution.

We are not dealing here with a property tax, but with a tax on the privilege of doing business, and we repeat our insistence on the admission in the record, that all the property, including franchises, of the appellant railways, is taxed under other statutes of the state on the basis of supposed full value. The Constitution of North Dakota, Article 11, Sec. 179, provides for taxation at full value of "the franchise, roadway, roadbed, rails and rolling stock" of all railroads, and among other items of railway property taxed by the North Dakota State Board are "Franchise per mile," "Roadway per mile," "Roadbed per mile," "Rails per mile," "Rolling stock per mile." Public Document 28, Proceed-

ings of the State Board of Equalization North Dakota 1918. The tax here is a privilege tax superimposed upon full property taxes upon both tangibles and franchises. The tax in question is on the privilege of carrying on business in North Dakota and cannot stand unless laid on the privilege only of carrying on purely local business. *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298.

Were this a tax on earnings including a proportion of earnings from interstate and foreign commerce, it would be invalid. *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217, and cases cited.

We are told in this opinion, as well as in *Looney v. Crane Co.*, 245 U. S. 178, that the court will look to practical rather than to logical or philosophical distinctions; will regard substance and not shadow; will look into the rule for determining the tax, the amount of imposition, and all other features of the state law in order to say whether the tax is really one so disproportionate to the local business within the state as to make it apparent that it taxes commerce among the states.

As bearing on the substance of things and as a practical, as distinguished from a philosophical suggestion, it is important to note that the tax laid by using the proportion of property basis, is not widely different from what would have been laid using a basis of earnings in North Dakota including in such earnings a mileage proportion of earnings from commerce among the states. The bill states as to each company the earnings deter-

mined on this basis. For example, the total Northern Pacific earnings from state business and a mileage proportion of interstate business for the year 1918 was $14,124,687.92, and the total earnings of its whole railway the same year were $102,908,259.47 (Transcript, fol. 18). The proportion of North Dakota earnings so ascertained to entire earnings is significantly close to the 14 per cent determined by the Tax Commissioner as that company's proportion of property in North Dakota to entire property.

If we are to look at substance and disregard form, if we are to take a practical rather than logical or philosophical view, and if the state legislature by giving the tax a particular name cannot determine its real character, certainly this tax is upon the privilege of carrying on in North Dakota commerce among the states and with foreign nations. It is plainly rated and based upon the total value of the property of these companies in North Dakota, much the larger part of which value is attributable to business other than that local in North Dakota.

The case of *St. Louis Southwestern Railroad Co. v. Arkansas*, 235 U. S. 350, relied on by the state in the court below, is not against our contention. That case involved a property tax; that is on the value of corporate franchise not included in *ad valorem* taxes otherwise levied. The law in question there simply provided a method for determining taxable value of property, and the court

was not considering in that case whether a privilege tax (in addition to such franchise tax) could be laid upon a similar basis of property valuation. The court in considering the franchise tax before it used language which we are quite content to have applied to the case here:

> "So in *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, the court reviewing numerous previous cases, laid down certain propositions as well-established and among them the following: (a) No state can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce; (b) This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in Interstate Commerce; and (c) The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States."

CHARLES W. BUNN,
E. C. LINDLEY,
M. L. COUNTRYMAN,
D. F. LYONS,
for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 329.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS; NORTHERN PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

vs.

GEORGE E. WALLACE ET AL.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

GEORGE E. WALLACE,
Attorney for Defendants in Error.

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

Statement of Case.

This case involves the construction of chapter 222 of the Session Laws of 1919 enacted by the Legislature of North Dakota and is commonly known as the Capital Stock Tax Act. Counsel in their brief in the court below referred to the same as House Bill No. 47.

The main features of the bill which are pertinent to this action are as follows:

"Every corporation, joint-stock company or association, now or hereafter organized under the law of any other State, the United States or a foreign country, and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of business in the State; *provided*, that in the case of a corporation engaged in business partly within and partly without the State investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State as the property of such corporation within the State bears to its entire property employed in such business both within and without the state; *provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State.* The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; *provided*, that for the purpose of this tax an exemption of $10,000 from the

> amount of capital invested in the State shall be allowed; *provided, further,* that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the tax commissioner all the information necessary to its computation."

This matter was before this court once before—Wallace *vs.* Hines, 253 U. S., 782. In that case the part of the law above quoted written in italics was declared to be unconstitutional.

The tax was reassessed after the decision in that case upon the basis of property used by the railway companies and which property was located within the State of North Dakota. In making such reassessment, the tax commissioner acted under the following language, the same being a part of that above quoted:

> "*Provided,* that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State as the property of such corporation within the State bears to its entire property employed in such business both within and without the State."

The tax commissioner considered that such business within the State is not otherwise more easily and certainly separable from such entire business and considered that business within

the State means such proportion of the entire business within and without the State as the property of such corporation within the State bears to its entire property employed in such business both within and without the State.

Thus it will be apparent that instead of using the mileage of the railways as a measure of taxation the tax commissioner now uses the property of the railways situated in the State as being the measure of taxation.

The tax sought to be collected under the North Dakota statute is not a property tax but a special excise tax upon doing business in the State. Wallace *vs.* Hines, *supra.*

North Dakota Law Does Not Violate the Commerce Clause of the Federal Constitution.

Appellants plead in their bill that this law violates the commerce clause of the Constitution of the United States. It has long been an established rule by the Supreme Court following a long line of decisions as follows:

1. No State can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce.

2. This provision does not prevent a State from imposing ordinary property taxes upon property having a *situs* within its territory although it be employed in interstate commerce.

3. The franchise of a corporation, although that franchise is the business of interstate commerce, is as part of its property subject to State taxation, provided at least the franchise is not derived from the United States.

Atlantic, etc., Tel. Co. *vs.* Philadelphia, 190 U. S., 160.

In a later case the Supreme Court has laid down also the following rules:

1. The power of a State to regulate the transaction of a local business within its border by a foreign corporation is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on State action.

2. Under the commerce clause, exclusive power to regulate insterstate commerce rests with Congress, and a State statute which, either directly or by its necessary operation, burdens such commerce is invalid regardless of the purpose for which it was enacted.

3. That a foreign corporation is partly or even chiefly engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

International Paper Co. *vs.* Mass., 246 U. S., 135, 141.
See U. S. Glue Co. *vs.* Oak Creek, 247 U. S., 321, 237.

In the case at bar it will be noticed that the State does not require any condition as a right to do a local business within the State. The corporation is free to enter the State or, if within the State when the law became effective, to remain in the State without any conditions whatsoever. The corporation however was required to pay the tax and upon failure their right to transact business in the State would be sus-

pended. This subject will be more fully treated hereinafter.

The law as construed by the tax commissioner requires that railroad companies shall be taxed on the value of the entire capital stock, but measured by the property of the company within the limits of the State.

The State of Arkansas passed an act in 1911 known as Act No. 251, Acts of Arkansas, page 233, which for intents and purposes is the same as the North Dakota statute. That act provided that such corporations should be taxed 1/20 of 1 per cent each year upon the proportion of the outstanding capital stock of the corporation represented by property in and used in business transacted in Arkansas. In the North Dakota statute it provides the same, except that it is therein designated as a tax of 50 cents per $1,000 valuation of the capital stock of the corporation represented by property used by the railway companies and which was located within the limits of the State. That act was subject to attack on the ground that it violated the commerce clause. The Supreme Court of the United States in the Arkansas case passed upon the subject and referred to the case of Postal Tel. Cable Co. *vs.* Adams, 155 U. S., 688, 695, and quoted therefrom as follows:

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation

> on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."
>
> St. Louis S. W. Ry. Co. *vs.* Arkansas, 235 U. S., 350, 364.

This same quotation was also used by this court in U. S. Glue Company *vs.* Oak Creek, 247 U. S., 321.

In the case of Baltic Mining Co. *vs.* Mass., 231 U. S., 68, this court had under consideration the same question. In disposing of the subject, the court said as follows (syllabus):

> "While the State may not burden interstate commerce or tax the carrying on of such commerce, the mere fact that a corporation is engaged in interstate commerce does not exempt its property from State taxation."
>
> United States Express Company *vs.* Minnesota, 223 U. S., 344.

In the Baltic Mining Company case the tax was measured by the authorized capital stock; the intrastate business was separable. Continuing further in said case the court used the following language (syllabus):

> "While interstate commerce itself cannot be taxed, the receipts of property or capital employed therein may be taken as a measure of a lawful tax."

The court also in the Baltic Mining Company case took occasion to use the following language:

> "A resort to the receipts of property or capital employed in part at least in interstate commerce when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the State, has been sustained."

The court quoted, as sustaining its position on this point, the following authorities:

> Maine *vs.* Grand Trunk Ry. Co., 142 U. S., 217.
> Provident Institution *vs.* Mass., 6 Wall., 611.
> Hamilton Company *vs.* Mass., 6 Wall., 632.
> Flynt *vs.* Stone & Tracy Co., 220 U. S., 107, 162-5.
> U. S. Express Co. *vs.* Minn., 223 U. S., 344.

A similar case from the State of Connecticut was considered by this court. In that case a tax of 2 per cent on net income is annually imposed. The amount of the net income is ascertained by reference to the income upon which the corporation is required to pay a tax to the United States. If the company carries on business also outside the State of Connecticut, the proportion of its net income earned from business carried on within the State is ascertained by apportionment in the following manner: The corporation is required to state in its annual return to the tax commissioner from what general source its profits are principally derived. If the company's net profits are derived principally from ownership, sale, or rental of real property or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income as the fair cash

value of the real and tangible personal property within the State bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from interstate property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the State bear to the total gross receipts of the company.

Upon the foregoing statement of facts it was held that the fact that the amount of net income was so allocated to the taxing State greatly exceeded in this case the portion actually received there does not prove that income earned outside was included in the assessment. The court also held that this did not violate the commerce clause.

> Underwood Typewriter Co. *vs.* Chamberlin, 254 U. S., 113.

In the Arkansas case the court fathered the principle laid down in the Atlantic, etc., Tel. Co. *vs.* Philadelphia, as has been set forth in this brief, by saying:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intra-state business in corporate form, the tax being based upon the amount and value of its property within the State. It is fixed at a definite percentage (1/20 of 1 per cent) of 'the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State,' and the act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the State and that owned and

used by it outside the State. In its essence the tax is not distinguishable from that which was sustained by this court in Western Union Telegraph Co. *vs.* Mass., 125 U. S., 530, and in another case between the same parties, 141 U. S., 40. See also Pittsburgh, etc., Ry. Co. *vs.* Backus, 154 U. S., 421, 430, 435; Indianapolis, etc., R. R. *vs.* Backus, 154 U. S., 438; Cleveland, etc., Ry. *vs.* Backus, 154 U. S., 439, 444, 445; Western Union Tel. Co. *vs.* Taggert, 163 U. S., 1, 18; Western Union Tel. Co. *vs.* Gottlieb, 190 U. S., 412, 421."

MAY THE STATE CANCEL THE CHARTER OF A FOREIGN CORPORATION TO DO INTRASTATE BUSINESS WHEN SUCH CORPORATION CANNOT WITHDRAW FROM THE STATE?

The act in question, after making provision for the date of the delinquency of the tax and the penalty, further provides that such tax shall be a first lien upon the property of the corporation and authorizes the Attorney General to institute proceedings for the collection of the said tax and penalty by a sale of the property or otherwise. It also provides, if such tax shall be delinquent for a period of ninety days in case of North Dakota corporation, that it shall constitute sufficient ground for the annulment of the existence of such corporation in an action brought by the Attorney General for that purpose. It also provides as follows:

> "and in the case of a foreign corporation on the certificate of the tax commissioner that such tax has been due for ninety days and remains unpaid the secretary of the State shall cancel the registration of such corporation and notify it that all of its privileges under the laws of the State are suspended until such tax, together with all penalties provided by this act, has been paid."

This identical question arose in the case of St. Louis Southwestern Railway Company *vs.* Arkansas, *supra,* in which case the Supreme Court was called upon to pass upon the validity of the following portions of the laws of the State of Arkansas:

> SECTION 20. "In case any corporation shall fail to pay the franchise tax prescribed by this act when it becomes due during the term of said certificate said tax commission shall cancel said certificate and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed by this act."

The Supreme Court of North Dakota has never been called upon to construe the provisions of the North Dakota statute relative to the above quotation from chapter 222. In this respect the instant case is identical with the Arkansas case. In the instant case no action has been started for the purpose of annulling any charter. The action herein brought is on behalf of the carriers for cancellation of the tax on the ground that the law violates the commerce clause of the Federal Constitution.

It is proper for the Supreme Court to wait until the State court has adopted a construction of the statute under attack rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Fedcarl Constitution. This court must assume that the State court will hold that such forfeiture has respect only to intrastate commerce and does not deal with interstate commerce.

Bachtel *vs.* Wilson, 204 U. S., 36, 40.

Adams *vs.* Russell, 229 U. S., 353, 360.

Plymouth Coal Co. *vs.* Pa., 232 U. S., 531, 546.

St. Louis S. W. Ry. Co. *vs.* Ark., *supra.*

In discussing this question the Supreme Court in the Arkansas case took occasion to use the following language:

> "It does not seem to us that section 20 when taken in connection with the context requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act applied to all corporations doing business in the State for profit whether organized under its laws or under the laws of other States, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore, it was natural that in such a provision as is contained in section 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all of the several kinds of corporations that are subject to the act. The forfeiture in terms is of 'the right of such corporation to do business in this State.' This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter. That topic is covered by section 15 of the same act, which applies however only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other States to which class plaintiff in error belongs.
>
> "In view of all these considerations we ought to assume, until the State through its judicial or administrative officers places a different construction upon the act, that section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else, that the section being void for unconstitutionality will be treated as severable from the other provisions of the act. Under either view it is obvious, from what has already been said, that the tax does not amount to a regulation of or a burden upon interstate commerce."

THE PLAINTIFF CORPORATIONS WERE CARRYING ON BUSINESS IN THE STATE OF NORTH DAKOTA DURING THE YEARS 1918 AND 1919.

The appellant railway companies claim that they are exempt from the State Capital Stock Tax Act for the years in question because they were not carrying on business or doing business in the State of North Dakota during the years 1918 and 1919, same being the period covered by the taxes of 1919 and 1920.

In support of this contention, they cite the cases of Zonne *vs.* Minneapolis Syndicate, 220 U. S., 187, and McCoach, collector, *vs.* Minehill Railroad, 228 U. S., 295.

In this action we desire to call the court's attention to the Federal Act of March 21, 1918, known as the Federal Control Act. Subdivision 15 thereof provides as follows:

> "That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the local police regulations in the several States except where such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks and bonds."

From the above quotation it is evident that Congress at the time it passed the Federal Control Act purposely avoided any complications in State taxation, and, applying the doctrine to the case at bar, it is the contention of the appellee that the Capital Stock Tax Act of the State is not in any way affected by the Federal Government taking over the railways of the State during the period of the war. For this reason the two cases above cited cannot be in point.

The mere fact that the revenue department of the Federal Government has construed the Federal Capital Stock Tax Act as not applying to railways during Federal control has no bearing whatever in the case at bar. Doubtless it was the intention of Congress to exempt the railways from Federal tax during the period of Government control. Upon reading the language above quoted from that act it is also apparent that the act was not intended for the restriction of the States in any taxing program the States might have. For this reason the cases cited by appellant, including the ruling of the Treasury Department, are not at all in point.

The appellee requests the court to take judicial notice of such act, and particularly to notice that none of the powers of the corporations were in any way impaired, but that they functioned the same as before the Federal act was passed, even to the officials of the various companies performing their usual functions, and none of the powers granted by the State of their incorporation were suspended.

The opinion of the court below contains the following statement:

> "The argument is made *in limine* that the excise tax provided by the statute was not assessable during the period of Government control and operation. The contention is overruled, first, because it was necessarily involved and before the Supreme Court in a former suit and does not appear to have been sustained and, second, because, the act of Congress and the proclamation of the President in which the operation of the railroads was taken over by the Government do not indicate any intention on the part of the Government to deprive the several States of the revenues normally accruing to them by reason of the

existence and operation of the railroads within their borders."

Conclusion.

Taking into consideration the former opinions of this court, and particularly that of St. Louis S. W. R. R. *vs.* Arkansas, *supra,* we are inevitably driven to the conclusion that the North Dakota Capital Stock tax against interstate carriers is not tax in violation of the commerce clause of the Constitution, but is in fact a tax against the carriers measured by the value of the property of the carriers used in their business within the State. The Arkansas case is on all fours in point. In fact it negatives the necessity of brief writing so far as the commerce clause is concerned.

Likewise a careful study of the authorities presented by plaintiffs in error and of the act of Congress providing for Federal control of railways forces the conclusion that the carriers were transacting business within the State of North Dakota during the years in question.

These things being resolved in favor of the defendants in error, the taxes in dispute must be declared valid and the district court should be affirmed.

Respectfully submitted,

GEORGE E. WALLACE,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 329.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS; NORTHERN PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

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ADDITIONAL BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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Further answering the brief of appellants the defendants in error desire to direct the attention of the Court to the case of St. Louis-San Francisco Railway Co. *vs.* Middlekamp, decided May 2, 1921, and published and accessible since the brief of defendants in error was printed. Among other questions presented to this Court in that case was whether or not Federal control of a railway during the taxing year would render it exempt from State taxation. The syllabus of the case on that point is as follows:

> "The fact that a domestic railway company was under Federal control during the tax year does not exonerate it from a State franchise tax."

Counsel, in their brief, contend that only local business done in the State should be used by the tax commissioner in calculating the taxes in dispute. The statute says that every corporation organized under the law of any other State

> "and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint stock company, or association, equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of business in the State."

To sustain counsel's position the law must be construed by this Court in such a way that the word "business" means "local business," for as we read further on in dealing with corporations engaged in business partly within and partly without the State, investment within the State

> "shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State."

Here again counsel contends for a construction which makes "business" mean "local business."

This point would be very material were this action now before the State courts. We do not believe this Court will take counsel's argument seriously for no Federal question is involved.

In making the report to the tax commissioner the carriers did not accredit the State with any portion of interstate business. It reported only local business. This is conceded.

In fact no attempt has ever been made by any carrier to keep its books in such a way that interstate business is divided. The law then continues as follows:

> "and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation bears to its entire property employed in such business both within and without the State."

The tax commissioner here is given more or less discretion based upon the kind of a report submitted to him. He was of the opinion that the business within the State was not more easily and certainly separable from the entire business within and without the State, hence he used property basis. We do not believe this Court will pass judgment upon and condemn the discretion used by the tax commissioner. Perhaps the presumption is that he did his duiy.

But of course this Court having once acquired jurisdiction of the questions involved will determine all questions involved, including questions purely of State law. Just how far the Court will go into questions of State law is a matter of discretion.

The State of Minnesota has a statute, section 1019, which provides that annually the auditor shall assess upon each company a tax of 6 per cent upon its gross receipts for business done in the State for the preceding calendar year. This statute was passed upon by this court. The case involved:

1. Earnings where 91 per cent of the mileage was in Minnesota.

2. Earnings from—

(*a*) Shipments received from a point of origin outside of the State to a point within the State.

(*b*) Shipments from within the State to a point without the State.

(*c*) Shipments from points out of the State which pass through the State to a destination out of the State.

In (*a*), (*b*), and (*c*) defendant received said shipments at a point in Minnesota and forwarded them over its lines to a second point within the State, the transportation while in the hands of defendant being performed wholly within the State. The transportation in connection with such shipments outside the State was performed by connecting companies other than defendant. Such shipments were made upon a through rate and a through way-bill of lading showing the origin and ultimate destination thereof and consisted of a single transportation transaction commencing with the delivery by the shipper to an express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed.

Appellants claim subdivision 1, above, to be an unconstitutional exaction as an attempt to regulate interstate commerce.

The Court upheld this tax on the authority of Lehigh Valley R. R. Co. *vs.* Penns., 145 U. S., 192. Yet but 91 per cent of the mileage was within the State and the earnings were considered "business done in the State" under section 1019 *supra.*

The Court said:

"We think the tax here in question comes within this principle (laid down in Postal Telegraph Co. *vs.* Adams, 155 U. S., 688, 697). There is no suggestion in the present record as was shown in Fargo *vs.* Hart, 193 U. S., 490, that the amount of the tax was unduly great, having reference to the real value of the property of the company within the State and the assessment made. The statute embraces receipts from all the business done within the State, including much which is purely local.

"Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned by this Court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State."

United States Express Co. *vs.* Minnesota, 223 U. S., 335.

See also the recent case of St. Louis, etc., R. Co. *vs.* Middlekamp, decided May 2, 1921.

Each one of the propositions presented in the Minnesota case could be duplicated in this case in the transaction of the business of the Great Northern, the Northern Pacific, and the Milwaukee railroads, except that they have no purely local lines within the State. A shipment from Fargo on the Great Northern to Wahpeton would be almost wholly without the State, while both points are within the State. Likewise, a shipment from Fargo to Grand Forks over the Northern Pacific or a shipment from Fargo to Ellendale over

the Milwaukee. Yet in the Minnesota case such was considered business done in the State and the tax upheld.

Erie Ry. Co. *vs.* Pennsylvania, 88 U. S. (21 Wall.), 492, 497; 22 L. Ed., 595.

In the latter case the Erie Railway Company had a line 450 miles long, only 42 miles of which were in Pennsylvania. An act of the State provided that every railroad company doing business in the State should be taxed according to the act. The Court held that doing business means the transacting of any business without regard to the amount of business done or the length of the railroad. The Court said:

> "It can scarcely be doubted that this company is doing business in the State of Pennsylvania when it receives gross earnings to an amount exceeding nine millions per annum for transportation over its road, of which forty-two miles lie within the State."

Counsel claims that the Arkansas case is not in point because it involves a different kind of a tax. We do not concede the distinction. But even if it be a different kind of a tax or called by a wrong designation in the statute, still it would be quite immaterial.

> "The validity of each tax must be decided on its own facts and a tax within the taxing power of the State will not be condemned as repugnant to the Federal Constitution unless its natural operation and effect render it a prohibited exaction."
>
> Kansas City Ry. *vs.* Kansas, 240 U. S., 227.

Respectfully submitted,

GEORGE E. WALLACE,
Attorney for Defendants in Error.

No. 330

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

TRAYLOR ENGINEERING & MANUFACTURING COMPANY,
Petitioner,

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First Collection District of Pennsylvania,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

WORTH E. CAYLOR,
Attorney for Petitioner.

BARNARD & MILLER PRINT, CHICAGO.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the United States Supreme Court:

1. Your petitioner, Traylor Engineering & Manufacturing Company, respectfully represents that it was organized as a corporation in the year, 1911, under the laws of the State of Delaware, that shortly thereafter it was duly licensed to carry on its business in the State of Pennsylvania, and that subsequent to its organization until now it has been lawfully carrying on its business of manufacturing and selling machinery.

2. That in the last part of the year, 1914, Samuel W. Traylor, president of this petitioner, planned to go to England for the purpose of negotiating a contract be-

tween your petitioner and the Government of Great Britain and Ireland, for the manufacture of munitions of war; that thereupon he sought the assistance of Henry C. Trexler, of Allentown, Pennsylvania, and James Phillips, Jr., of the City of New York, New York, both men of influence and considerable wealth, in obtaining an audience with the proper officials of the Government of Great Britain and Ireland awarding such contracts; that in December, 1914, an arrangement was entered into between said Trexler and Phillips and your petitioner by which the said Trexler and Phillips should pay a portion of the expenses of the said Samuel W. Traylor to Europe and return, should furnish this petitioner a bond, if necessary, should give letters recommending this petitioner, should procure for Samuel W. Traylor strong letters of introduction to citizens and government officials of Great Britain and Ireland, and in return this petitioner would pay to the said Trexler and Phillips certain commissions or shares in the net gains resulting from any contract secured by the said Samuel W. Traylor in his quest, as aforesaid.

3. That thereafter, in the last part of the year 1914, Samuel W. Traylor went to England and by means of a strong letter of introduction written by the said Phillips, the said Samuel W. Traylor immediately obtained an audience with the officials of the war office of the Government of Great Britain and Ireland, and through strong letters of recommendation furnished by the said Trexler and Phillips, together with the efforts of the said Samuel W. Traylor, a contract was entered into between the Government of Great Britain and Ireland and this petitioner, on January 22, 1915,—changed in numbers and prices by letters dated March 16 and 18, 1915,—by the terms of which, among other things, this petitioner was to manufacture for and deliver to, the Government of Great Brit-

tain and Ireland, one million high explosive shells, one-half at a price of $9 a shell, and one-half at a price of $8 a shell; that this petitioner at the time said contract was entered into did not have a plant large enough or in any way equipped for the manufacture of shells, and was unable financially to pay the amounts necessary to properly equip the plant for the manufacture of shells in the amount required by the contract: therefore, through the efforts of the said Samuel W. Traylor, one of the conditions of said contract provided that the Government of Great Britain and Ireland would pay $1,000,000 in money to this petitioner immediately after the signing of the agreement, providing this petitioner would furnish a satisfactory bond to cover the due re-payment of the advancement of $1,000,000, in case this petitioner failed to give delivery of the shells in a satisfactory condition, in accordance with the drawings and specifications contained in said contract.

4. That thereafter, through the efforts of the said Trexler and Phillips, this petitioner was able to and did furnish to the representative of the Government of Great Britain and Ireland three bonds under the terms of the aforesaid contract, one on February 4, 1915, for $350,000, one on February 26, 1915, for $500,000, and one on February 26, 1915, for $150,000; that the said Trexler and the said Phillips, in turn became idemnitors to the surety companies furnishing the bonds in the total sum of $1,000,000, as required by said munitions contract; and that thereupon this petitioner received, under the terms of said contract, the sum of $1,000,000, with which money this petitioner was to, and did, equip its plant with machinery, construct new buildings and purchase raw materials, supplies and parts, all necessary to successfully carry out said contract.

5. That as a part of the expenses of the said Samuel W. Traylor on his trip to England, as aforesaid, the said Trexler paid the sum of $666, and the said Phillips the sum of $500; that prior to the time all the terms of the munitions contract were agreed upon and prior to the time of making the last bond, as aforesaid, this petitioner entered into a written contract with the said Trexler and the said Phillips, dated February 17, 1915, re-stating the terms of the original understanding, in which it was recited that the net profits resulting from the aforesaid munitions contract should be divided as follows: Twenty-five per cent. to James Phillips, Jr., thirty-three and one-third per cent. to Harry C. Trexler and forty-one and two-thirds per cent. to this petitioner. This agreement apportioning the profits, recited as the consideration that the said Trexler and Phillips had contributed money towards the expenses of the said trip of Samuel W. Traylor and had joined with this petitioner in the execution of certain bonds and other undertakings in connection with the fulfillment of the said munitions contract. It also provided that the profits should be determined in a particular manner, as follows:

> "It," (the petitioner), "shall first be allowed and receive all disbursements, costs and expenses, paid or incurred for material, labor tools, supplies, etc., in or in connection with the carrying out of the said contract plus the usual overhead expense as charged by the Traylor Company, in its regular business, namely, one hundred and fifty per cent. (150%) on the cost of the labor or wages paid to the men employed on the work or contract, and it shall then be allowed to receive a further amount of ten per cent. (10%) on such manufacturing cost as its manufacturing profit.
>
> It is understood that the special buildings being erected and the machinery and equipment being purchased by the Traylor Company, together with the cost of alterations and additions to its present build-

ings and equipment for the purpose of carrying out said contract and also the time of S. W. Traylor and the expense of securing the contract, shall be paid out of the advance payment received under the contract and charged as part of the cost of producing the shells. Upon the winding up of the business covered by this agreement, the special machinery and equipment shall be sold or otherwise disposed of as may be mutually agreed upon between the parties, and the net proceeds divided in the proportions hereinafter specified for the net profits, provided, however, that the Traylor Company shall first be re-imbursed in full for its manufacturing cost and profit, incurred in connection with said contract."

This contract of February 17, 1915, also provided that "the said Phillips and Trexler should give such further assistance by thei advice, credit and influence as may be in their power, to the end that the contract may be carried out to the mutual profit and advantage of all concerned."

6. That at no time were the said Phillips and Trexler pecuniarily interested in this petitioner or connected with it in any other way, excepting such connection as they may have had growing out of said contract with the Government of Great Britain and Ireland; they furnished no capital, no financial assistance and did nothing in supervising the work, neither did they give advice or assist in the manufacture of the said shells; that subsequent to the making of the said munitions contract with Great Britain and Ireland, this petitioner made other contracts for the manufacture of war materials and carried them out to their completion, in which contracts the said Trexler and Phillips had no concern and no interest whatsoever.

7. That this petitioner thereupon manufactured and delivered the shells under the terms of the said munitions contract with the Government of Great Britain and Ire-

land, during the remainder of the year 1915, and the contract was concluded and fully performed in the year 1916, shortly prior to the 16th day of February; that the manufacture and delivery of shells, and the collection of the money therefor, were entirely done by this petitioner, and the said Trexler and Phillips did nothing whatsoever with the carrying out of the terms of said contract, except the procuring of bonds, and subsequently, through the efforts of said Trexler, this petitioner was permitted to make firing tests of the shells on the testing field of the Bethlehem Steel Company, at or near Bethlehem, Pennsylvania, as required by the contract.

8. That on February 16, 1916, this petitioner made a written contract of settlement, under seal, with the said Trexler and Phillips, based upon the aforesaid contract of February 17, 1915, by the terms of which this petitioner then and there paid to the said Trexler the sum of $650,000, and to the said Phillips the sum of $487,500; that for various considerations therein mentioned, mutual releases were entered into by which each of the parties forever released the others from any and all claims that each might have against the other, growing out of the said munitions contract and the said contract of February 17, 1915; and this petitioner thereafter had no relations whatsoever with the said Trexler and Phillips.

9. That long after said munitions contract was fully performed and said payments were made, on September 8, 1916, Congress of the United States enacted a law imposing an excise tax on persons, partnerships, corporations and associations manufacturing munitions of the kind referred to in the contract of this petitioner with the Government of Great Britain and Ireland, at the rate of twelve and one-half per cent. on the entire net profits actually received or accrued for the taxable year from

the sale or distribution of such articles manufactured within the United States. Pursuant to this law, this petitioner made a return to the Commissioner of Internal Revenue of its profits under the terms of the aforesaid munitions contract for the year, 1916, and in making such return deducted as expenses, or money not received or held as net profits, such part of the payments made to the said Trexler and Phillips as were apportionable to the year 1916, and paid its tax as thus computed.

10. That thereafter, the Commissioner of Internal Revenue concluded that this petitioner and the said Trexler and Phillips were engaged in business as co-partners in respect to the said munitions contract, and that the moneys paid by this petitioner to the said Trexler and Phillips were actually paid in distribution of partnership profits within the meaning of the said law taxing such profits. The said Commissioner thereupon determined that the profits by this petitioner for the year, 1916, paid to said Trexler were $213,517.60, and to said Phillips were $160,138.16; and the said Commissioner thereupon made an additional assessment against this petitioner for the year, 1916, of a sum equal to twelve and one-half per cent. of the amount of the said payments to the said Trexler and Phillips, applicable to the year, 1916, amounting to $46,706.97, which sum, on the 4th of November, 1918, was paid by this petitioner, under protest, as provided by law, to Ephraim Lederer, Collector of Internal Revenue for the First Collection District of Pennsylvania, who is hereby made respondent to this petition.

11. That this petitioner thereupon, on December 28, 1918, filed a claim with the respondent, in accordance with law, for the refund of this tax, which claim was duly rejected by the Commissioner of Internal Revenue on July 15, 1919.

12. That on September 17, 1919, this petitioner inst tuted a suit against the respondent in the District Cou of the United States, for the Eastern District of Pennsy vania, to recover the sum of $46,706.97, with intere thereon from the 4th of November, 1918, claiming that th money was illegally exacted from this petitioner as a mun tions manufacturer's tax. There were other sums money asked for in this suit, which were refunded to th petitioner and with which this petition is in no way co cerned. The affidavit of defense filed in said cause b the respondent raised no substantial controversy ov the facts, and at the trial the facts as above related wer in all respects agreed to. The case was tried before th court without a jury, the court finding the issues and e tering judgment for the defendant. The trial court refuse to make any ruling upon petitioner's request as to whethe or not this petitioner and the said Trexler and Phi lips were engaged in business as a "partnership" or "asso ciation" within the meaning of those words as used in th said Munitions Manufacturer's Tax Law. The said cou wrongfully and erroneously held: That the payments mad to the said Trexler and Phillips by this petitioner wer "not made as compensation for moneys advanced or serv ices rendered, but are made by way of distribution o profits among the joint ventures"; that the petitione was a munitions manufacturer, taxable as such, "and th profits made were its profits and received by it"; tha the act of the said Trexler and Phillips in assuming th large financial risk incident to the execution of the abov mentioned indemnity agreement was "voluntarily don in furtherance of what then developed to be in promotio of their own interests."

13. That thereafter this case was reviewed on writ o error by the Circuit Court of Appeals, for the Third Cir cuit; that the said Circuit Court of Appeals thereafte

filed its opinion and entered a judgment on the 14th day of March, 1921, affirming the judgment of the said District Court, wrongfully and erroneously holding: That the United States was only concerned with the said munitions contract, "for it was only under this contract that munitions were made and profits earned"; that the tax is directed against the "person" making and selling munitions; that "If that person chose before creating profits to promise by a side contract to give or pay them to others when earned, then he could do so only after the Government had exacted the tax for the privilege of doing the particular business out of which he had made profits of this kind"; that "as profits distributed under the side contract in no way entered into the cost of manufacturing of munitions under the main contract," they "cannot be regarded as an expense of manufacture deductible from the gross amount received from sales in ascertaining taxable net profits."

14. Your petitioner respectfully states, that in rendering their opinions, the said District Court and the said Circuit Court of Appeals did not refer to or discuss a single reported decision of this or any other court, and wrongfully and erroneously construed the said munitions act in compelling this petitioner to pay an excise tax on profits that it did not have and could in no way obtain or recover from the said Trexler and Phillips; that the contract of this petitioner with the said Trexler and Phillips was a contract entered into in good faith and was valid and enforcible, and the money paid out thereunder was not a gift as intimated in the opinion of the Circuit Court of Appeals; that said contract was not entered into or money paid to said Trexler and Phillips for the purpose of defrauding the Government of the United States or avoiding the payment of a lawful tax; that the munitions contract entered into with the Government of Great Britain and Ireland by this petitioner was not a "joint ven-

ture'' or a ''partnership'' or an ''association'' of this petitioner with said Trexler and Phillips, and the payments made to Trexler and Phillips were a lawful expense of this petitioner in procuring and performing the said munitions contract; that if it were a ''joint venture,'' ''partnership'' or ''association,'' comprehended by the said munitions act, then the said Trexler and Phillips should be taxed, and not this petitioner, on their profits in ''carrying on the business,'' as provided by the munitions act; that the said judgments were erroneous in holding that this petitioner should pay an excise tax on profits earned and held by this petitioner's subcontractors, the said Trexler and Phillips; and the said judgments are in conflict with the law as announced by this court in its decisions.

15. This petitioner respectfully asks that an order be entered by this Honorable court, directing that the writ of certiorari issue out of this court addressed to the United States Circuit Court of Appeals, for the Third Circuit, commanding and directing said court that it transmit into this court for further proceedings a duly certified copy of the record in the case entitled *Traylor Engineering & Manufacturing Company, Plaintiff in Error* v. *Ephraim Lederer, Collector of Internal Revenue, for the First Collection District of Pennsylvania, Defendant in Error,* having the number 2612, and that this petitioner have such further relief in the premises as to your Honors shall seem meet.

Mark E. Taylor,

Attorney for Petitioner.

BRIEF IN SUPPORT OF THE FOREGOING PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

In the last part of the year 1914, Samuel W. Traylor, president of the Traylor Engineering & Manufacturing Company, a concern engaged in the manufacturing of heavy machinery, at Allentown, Pennsylvania, planned to go to England for the purpose of procuring a contract for the manufacture of munitions of war. Traylor needed influence to get a contract, and if a contract were procured, his corporation needed money to carry it out. The plant of the corporation was not equipped for manufacturing munitions and needed buildings and machinery. He had heard that the British Government was financing contracts of this kind, but he needed proper financial backing in order to give a bond to secure a re-payment of the money advanced.

Traylor then approached Henry C. Trexler of Allentown, Pa., and James Phillips, Jr., of New York City, men of influence and large means, in order to get their assistance in obtaining a contract. These gentlemen were not interested in any way in the Traylor Engineering & Manufacturing Company. Traylor told them that he wanted letters of introduction to prominent government officials of Great Britain, letters of recommendation, the privilege of referring to them as to his company, and that they would provide the necessary security for the re-payment of any money he might get advanced, if a contract were secured. Trexler and Phillips agreed to do all this and also agreed to pay a share of the expense of Traylor's

trip to Europe. In return Trexler and Phillips asked a certain percentage of the profits made on any contract procured, as their commissions, which was agreed to by the corporation.

Samuel W. Traylor went to England and through a letter of introduction written by Phillips, favorable letters of recommendation, written by Trexler and Phillips, and through the references by Traylor to Trexler and Phillips, as to the ability of the Traylor Engineering & Manufacturing Company to carry out its contract, a contract for the manufacture and delivery of one million shells was procured by the Traylor Engineering & Manufacturing Company for a total price of $8,500,000. The contract also provided for the payment at once to the Traylor Engineering & Manufacturing Company of $1,000,000, providing a bond was given to secure the re-payment of such sum in case of the failure of the Traylor Engineering & Manufacturing Company to manufacture and deliver the shells in accordance with the contract. Bonds in this amount were given by surety companies at the request of Trexler and Phillips, Trexler and Phillips in turn indemnifying the surety companies. Later, Trexler secured the use of the testing grounds of the Bethlehem Steel Company for the Traylor Engineering & Manufacturing Company in testing the shells in accordance with the requirements of the contract. Nothing more was done by either Trexler or Phillips. They furnished no capital or financial assistance in the manufacturing of the shells. They were not members of a "partnership" or "association" with the Traylor Engineering & Manufacturing Company in any meaning of these two words. They were not liable on the munitions contract or to creditors. They could not be required to participate in any loss of the Traylor Engineeriing & Manufacturing Company, and while their risk on their indemnity bonds

was great, in case the Traylor Engineering & Manufacturing Company did not manufacture and deliver shells in the manner provided by the contract, yet they always had the right to recover any sum they might have been called on to pay from the Traylor Engineering & Manufacturing Company, the principal on the bond. They were employed to procure a customer and to provide a bond, the same as in countless other transactions. The contract was not immoral, unconscionable or against publice policy. The fact that their commissions were large was their good fortune.

In February, 1915, prior to the making of the last bond, a written contract was entered into between Trexler, Phillips and the Traylor Engineering & Manufacturing Company, re-stating the provisions and terms of their original agreement under which Trexler was to get thirty-three and one-third per cent., Phillips twenty-five per cent., and the Traylor Engineering & Manufacturing Company forty-one and two-thirds per cent. of the profits made out of the munitions contract, which profits were to be arrived at in a method exactly prescribed in the contract. The British Government advanced to the Traylor Engineering & Manufacturing Company one million dollars, which sum was used in erecting new buildings, installing new equipment and purchasing raw materials and parts.

The shells were manufactured in the remainder of the year 1915 and the first part of year 1916, and the contract was fully completed by the middle of February, 1916. A settlement was thereupon made on February 16, 1916, with Trexler and Phillips, evidenced by a written agreement. The sum of $650,000 was then paid to Trexler, and the sum of $487,500 to Phillips. Each party released the other in an agreement, under seal, from any and all claims that in the future might arise, growing out of said con-

tract. It is the legal presumption that Trexler and Phillips paid the Federal income tax on these sums as required by law. During all these times there was no notice of any war munitions tax, especially that if there were such a tax, it would not be imposed upon those making and holding the profits.

Seven months later in September, 1916, Congress passed the Munitions Tax Act compelling all persons manufacturing munitions to pay as an excise tax twelve and one-half per cent. of the net profits.

The pertinent provisions of this act are as follows:

"Sec. 300. That when used in this title—

The term 'person' includes partnerships, corporations, and associations.

The term 'taxable year' means the twelve months ending December thirty-first. The first taxable year shall be the twelve months ending December thirty-first, nineteen hundred and sixteen.

Sec. 301. That every person manufacturing gunpowder and other explosives, * * * shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States; Provided, however, that no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen.

Sec. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:

(a) The cost of raw materials entering into the manufacture;

(b) Running expenses, including rentals, cost of repairs, and maintenance, heat, power, insurance, management, salaries and wages;

(c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the business, and the proceeds of which have been actually used to meet such needs;

(d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to manufacture;

(e) Losses actually sustained within the taxable year in connection with the business of manufacturing such articles, including losses from fire, flood, storm or other casualty, and not compensated for by insurance or otherwise; and

(f) A reasonable allowance according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

Sec. 307. The tax may be assessed on any person for the time being owning or carrying on the business, or on any person acting as agent for that person in carrying on the business, or where a business has ceased, on the person who owned or carried on the business, or acted as agent in carrying on the business immediately before the time at which the business ceased.

This last section, although heretofore relied upon by counsel for respondent, was not mentioned or discussed in either of the opinions rendered by the District Court or Circuit Court of Appeals. It plainly refers to conditions arising after the passage of the act and not before. Under no theory was the petitioner an agent.

The Traylor Engineering & Manufacturing Company, in its return for the year 1916, deducted that portion of the money paid to Trexler and Phillips, earned in the year, 1916, as money actually paid out as running expenses, or wages or salaries. claiming that this sum was lawfully paid out as the cost of procuring and doing busi-

ness. The Commissioner of Internal Revenue refused to allow this deduction, and compelled it to pay $46,706.97 as a tax on the money that it had already paid out to Trexler and Phillips. This was paid under protest, and later suit was instituted in the United States District Court, for the Eastern District of Pennsylvania for the return of this sum, with interest. The court there held that the payment of this money was not a running expense; that the carrying out of the contract was a joint venture, and that the Traylor Engineering & Manufacturing Company was primarily and ultimately responsible to the Government for the payment of the excise tax on all profits made in the manufacture of war munitions, without considering any liability or responsibility on account of the agreement made with Trexler and Phillips.

The case was then taken by writ of error to the Circuit Court of Appeals, for the Third Circuit. The Circuit Court of Appeals, in its opinion, held that the Government of the United States was not concerned with any contract made by the Traylor Engineering & Manufacturing Company with any other person or persons, for the purpose of distributing anticipated profits. It entirely ignored the liability of the Traylor Engineering & Manufacturing Company to pay to Trexler and Phillips any sum of money out of the profits. It also overlooked the question whether or not Trexler and Phillips were not primarily liable to pay the excise tax, if not, as manufacturers, then as agents, partners or sub-contractors. It assumed that the contract made with Trexler and Phillips was made in the light of the definition of profits in the act of Congress, which act was passed almost a year and a half after the contract was made.

That is, because the payment to Trexler and Phillips was based upon the contingency of earnings being made

and the word "profits" was used in the contract in describing these earnings, and because subsequently Congress levied a tax on earnings, and also used the word "profits," therefore these two words must mean the same thing and the moneys paid to Trexler and Phillips could not under any circumstances be construed to be an expense to be deducted before the Government collected its tax.

In arriving at the same result, the construction of this statute, given by the District Court, is one thing, and the construction given by the Circuit Court of Appeals is another. No decision of this or any other court was cited in either opinion as an authority on any point, for the apparent reason that there is no authority anywhere to sustain such a confiscatory interpretation of an act of Congress. The result is that the Traylor Engineering & Manufacturing Company was compelled to pay $46,706.97 as a tax on profits, which profits were never made, never existed in fact, never were in the possession of the corporation as profits capable of being distributed to its stockholders as dividends, and never could be sued for, or recovered by the corporation.

The writ of certiorari should issue for the following reasons:

I.

A COURT IN CONSTRUING AN ACT OF CONGRESS DIRECTING THE COLLECTION OF A TAX ON PROFITS ACTUALLY EARNED AND RECEIVED TO MEAN THAT A TAX CAN BE COLLECTED ON MONEY NOT EARNED, NOT RECEIVED AND NOT POSSESSED, IS USING THE FORMS OF LAW TO COMMIT AN ACT OF OPPRESSION AND ACTUAL INJUSTICE AND IS, THEREFORE, A GRAVE AND IMPORTANT MATTER.

In the case of *Warner* v. *New Orleans*, 167 U. S. 467, 474, it is held that this court will issue a writ of certiorari where it is believed that the "disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable."

It is certainly a grave and important matter when an act of Congress, designed to collect a tax on "profits" actually made and in the actual possession of a manufacturer, is construed in such manner that a manufacturer is compelled to pay a tax on moneys which were not his profits, and not in his possession.

Mr. Justice Woolley in beginning his opinion, therefore, necessarily says, "the controversy is quite unusual."

The Munitions Tax Act was undoubtedly designed to collect as a tax money that was held by the corporation and susceptible of being distributed as profits to the stockholders of such corporation, or a tax on profits made and in the possession of the members of the partnership or association, as the case may be. It seems certain that it was not designed as a tax on moneys held, which were not profits.

Prior to the decisions of the District Court and the Circuit Court of Appeals in the case now presented for consideration, the Commissioner of Internal Revenue in interpreting the Munitions Tax Act allowed deductions of

commissions paid as a cost of procuring business, and it is the fair presumption that his conclusion must have been acted upon throughout the entire United States, which if done, would have made an unfair imposition of the tax in the present case.

In an official letter, published under date of February 4, 1917, in answer to certain inquiries, submitted in relation to the proper construction of this act, he said:

> "Since Title III of the Act of Congress of September 8, 1916, provides that an excise tax of 12½ per cent. upon the entire net profits actually received or accrued for said year from the sale or disposition of certain articles manufactured within the United States, shall be assessed against the manufacturer thereof, and it specifies the manner in which such net profits shall be ascertained and enumerates those items which may be deducted by the manufacturer, it is the opinion of this office that those commissions or bonuses which were paid prior to January 1, 1916, for obtaining contracts for munitions and which contracts were fulfilled and deliveries made and the munitions paid for after January 1, 1916, would be allowable deductions as such necessary expenses as are contemplated by Subsection (b) of Section 302 of the Act referred to, and therefore would constitute allowable deductions in ascertaining net profits for the purpose of the tax. Such commissions and bonuses should, however, be spread over the life of the contract with respect to which such commissions and bonuses were incurred and the pro rata proportion of the same may be deducted from the gross income of each year until the contracts are fully performed."

More than two years after his ruling of February 4, 1917, the Commissioner of Internal Revenue, wrote a letter to the Traylor Engineering & Manufacturing Company, in which he apparently changed his views. In this letter, dated July 5, 1919, he held that the contract with Trexler and Phillips "constitutes a purely partnership

agreement, and entitles the parties concerned to a division of the profits in the undertaking instead of charges for services rendered."

This case now under consideration arises because of this latter holding of the Commissioner of Internal Revenue that the Trexler and Phillips contract was an act of partnership, and that one of the partners is responsible for the tax on the entire profits received by all the partners.

In arriving at this result the District Court held that it is not the meaning of the Munitions Tax Act that a corporation may pay out of its profits $1,000,000 as a premium for going on a surety bond for that sum and "thereby reduce the measure of the excise tax which the corporation would have been otherwise called upon to pay" for the reason that "obviously such payments are not made for compensation for moneys advanced or services rendered, but are made by way of distribution of profits among the joint ventures." The District Court refused to hold that the contract between the petitioner, Trexler and Phillips, constituted an "association" or a "partnership," yet in effect it does so hold in the language used in the opinion.

The Circuit Court of Appeals, in affirming the judgment of the District Court, did not construe the contract with Trexler and Phillips to effect a partnership or association, or even a joint venture, but held that the Traylor Engineering & Manufacturing Company, by entering into an agreement with Trexler and Phillips to pay them money and using the word "profits,"—which was the same word used in the act itself,—before distributing such profits, the Government tax must be paid; that the moneys paid under the obligation of the Traylor Engineering & Manufacturing Com-

pany to pay money to Trexler and Phillips could in no way be termed an expense; that "It was just between these two contracts—between the conclusion of the one and the performance of the other, just after profits had been earned under one and just before they were distributed under the other, that, we think the Munitions Tax Act entered. Right here the law spoke."

Although the several contracts had all been performed and were not made in the light of the War Munitions Tax Act enacted a long time afterwards, the Circuit Court of Appeals held in effect that the Traylor Engineering & Manufacturing Company could not make an obligation to pay for services measured by profits, though such obligation was not against public policy, not against any latent constitutional provision, and not against any existing legislation.

The judgment of the Circuit Court of Appeals is conclusive on the proposition that the officials of the Government, through the forms of law, have actually confiscated $46,706.97, property of this petitioner, which money is not profits and in no way can ever be recovered by this petitioner from any source, except by this proceeding.

The imposition of this tax is contrary to the opinions of this court, which court has uniformly held that a tax is never imposed on a citizen when a question of his liability is at all doubtful. In the case of *Gould* v. *Gould*, 245 U. S. 151, 153, Mr. Justice McReynolds, in delivering the opinion of this court, says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to enhance matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United*

States v. *Wigglesworth*, 2 Story, 369; Fed. Cas. No. 16,690; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55."

II.

THE PRECEDENTS OF THIS COURT ARE THAT IT WILL DIRECT A WRIT OF CERTIORARI TO ISSUE TO REVIEW A CASE WHERE AN ACT OF CONGRESS WAS CONSTRUED.

A search of the opinions of this court shows that this court will issue a petition for certiorari where it is important to construe the meaning of words in the various revenue acts passed by Congress. In the case of *Crocker* v. *Malley*, 249 U. S. 223, the court directed a petition for certiorari to issue to review the act of the Circuit Court of Appeals for the First Circuit. In that case the attempt was made to assess certain individuals as an "association" within the meaning of the Income Tax Act of October 3, 1913, on dividends received from a corporation that itself was taxable upon its net income. The Circuit Court of Appeals decided "that the plaintiffs, together, it would seem, with those for whose benefit they held the property, were an association." But this court reversed the judgment of the Circuit Court of Appeals.

In the case of *Gulf Oil Corporation* v. *Lewellyn*, 248 U. S. 71, this court issued a writ of certiorari to the United States Circuit Court of Appeals, for the Third Circuit, in a suit to recover an excise tax levied upon certain dividends as income under the act of October 3, 1913, Mr. Justice Holmes held, page 73, "In view of our decision that the dividends here concerned were not income, it is unnecessary to discuss the further question that has been raised under the latter clause as to the effect of the fact that excise taxes upon the subsidiary corporations had been paid," and the judgment was reversed.

In the case of *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69, this court issued a writ of certiorari to the Circuit Court of Appeals, for the Second Circuit, to review a construction of the words "net income" used in the Corporation Tax Act of August 5, 1909. This court held that the interest upon the bonded or other indebtedness of the corporation was not deductible from its net income as "ordinary and necessary expenses" as provided in the act levying an excise tax on the net income of corporations.

This court has also issued writs of certiorari to review the judments of lower courts construing the meaning of words in revenue acts in the following cases: *McCoach* v. *Pratt*, 236 U. S. 562; *United States* v. *Whitridge*, and *United States* v. *Joline*, 231 U. S. 144; *McCoach* v. *Minehill* and *Schuylkill R. R. Co.*, 228 U. S. 295.

While not a revenue case, but as a precedent, showing that this court issues writs of certiorari to review decisions of lower courts construing acts of Congress, the case of *Gleason* v. *Thaw*, 236 U. S. 558, is particularly pertinent. In this case this court deemed it important to determine how comprehensive was the word "property," as used in the Bankruptcy Act.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THE LAW OF THIS COURT AS ANNOUNCED IN ITS DECISIONS CONSTRUING THIS ACT AND A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE SAME.

On March 14, 1921, the Circuit Court of Appeals entered judgment in this case. Prior to this time, on March 1, 1920, this, the United States Supreme Court, had decided three cases where writs of certiorari had been is-

sued to the Circuit Court of Appeals for the Third Circuit to construe the Munitions Tax Act, as follows: *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Worth Bros. Co.* v. *Lederer*, 251 U. S. 507; *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511.

Each of these cases was brought to recover excise taxes paid under protest to the Revenue Collector under the Munitions Tax Act. In the Carbon Steel Co. case, the corporation had obtained from the British Government three contracts for the making of shells. The petitioner, the corporation, "was not equipped, nor did it have facilities, for doing any of the described work, except the manufacture of steel suitable for the shells in bar form, and, therefore, to procure the manufacture of the shells, it, petitioner, did certain work and entered into numerous contracts in relation to the various steps in making the completed shell." The petitioner claimed that it was not a manufacturer as meant in the Munitions Tax Act, because it did not in fact manufacture the shells. The court held, opinion rendered by Mr. Justice McKenna, that the petitioner "was the contractor for the delivery of shells, made the profits on them, and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach,—profits made out of the war and taxed to defray the expense of the war." "Petitioner, it is true, used the services of others but they were services necessary to the discharge of its obligations and to the acquisitions of the profits of such discharge." This court held that the person manufacturing does not necessarily mean the person doing the physical act of manufacturing; that the person liable to pay the tax is the person that makes profits out of the contract. That is, if the Traylor Engineering & Manufacturing Company made a contract with Trexler and Phillips, all relating to the successful carrying out

of the original contract with the British Government, then all parties making the profits, whether doing the physical labor of manufacturing or not, are liable for the tax. "Of course," says Mr. Justice McKenna, "it did not contemplate that the 'person manufacturing' should use his own hands,—it contemplated the use of other aid and instrumentalities, machinery, servants and general agents availing thereby of the world's division of labor, but it contemplated also the world's division of occupations and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and when availed of for profits, *the latter could not thereby escape being taxed.*"

Therefore, if the money received by Trexler and Phillips was received as a result of a contract for the manufacture and delivery of munitions, that, Trexler and Phillips, were made use of under the "world's division of occupations" or "world's efficiency," then they should have been pursued by the Collector of Internal Revenue and made to pay the tax. For Mr. Justice McKenna concluded his opinion with this language: "But it is a sufficient answer to say that the tax here in issue is the tax on the profits of the petitioner not on the profits of the subcontractors. The question whether such subcontractors were correctly assessed concerns them and not the petitioner who is resisting the tax on the profits actually made by him, and none other."

Certainly this court in this opinion indicated a result directly opposite to that of the Circuit Court of Appeals in the case now up for consideration, where the Circuit Court of Appeals said that the Traylor Engineering & Manufacturing Company must pay the tax on all profits made by it, and also on those made by its subcontractors.

In the Worth Brothers Co. case, *supra*, it appeared that

Worth Brothers Co. a subcontractor, was making the steel, and did the forging on certain shell bodies under an order from the Midvale Steel Co., to enable the latter company to carry out a contract which it had for the Government of France for certain explosive shells. Worth Brothers Co. brought suit to recover the tax imposed upon it under the Munitions Tax Act by the Collector of Internal Revenue, because it, in fact, did not make shells and was only furnishing the raw materials, or forgings. Pursuant to the opinion written in the Carbon Steel Co. case, Mr. Justice McKenna held that the Government was after the profits made on munitions contracts, and that manufacturing was not limited to the physical completion of the shell. The opinion is concluded with this language: "'Manifestly,' as counsel for the collector says, 'the shell body was not completed, manufactured, by either of the companies which were engaged in its production,' but 'by the two acting together.' And each, therefore, is liable for the profit it made, and judgment is affirmed."

While this court in these cases did not consider whether or not the cost of procuring business and commissions paid out to agents who aided in carrying out the contract were a deductible expense of manufacturing, yet this court did consider the question as to who was a subcontractor, what person was engaged in manufacturing, and what person should pay the tax. The conclusion arrived at by this court is contrary to the opinion announced by the Circuit Court of Appeals in the case at bar, where the Circuit Court of Appeals did hold that the corporation receiving the original contract must pay the whole tax.

If the Circuit Court of Appeals for the Third Circuit, had followed their own conclusion that the Traylor En-

gineering & Manufacturing Company could not pay Trexler and Phillips money as a deductible expense, because Trexler and Phillips were jointly interested with the petitioner in the profits arising from the munitions contract, and had applied the law, as laid down in the opinions of this court in the Carbon Steel Co. and Worth Bros. Co. cases, then it should have found, as stated by Mr. Justice McKenna, that "each, therefore, is liable for the profit it made," and not that the Traylor Engineering & Manufacturing Company was liable to pay the tax not only on the profits received and held by it, but also on the profits received and held by Trexler and Phillips.

For the reasons stated above, it is urged that this court direct that the writ of certiorari be issued to the Circuit Court of Appeals, for the Third Circuit, as prayed in the petition.

Respectfully submitted,

Worth E. Taylor

Attorney for Petitioner.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ET AL. *v.* WALLACE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 329. Argued December 16, 1921.—Decided January 9, 1922.

1. Where the case as made by the bill involves a real and substantial question under the Constitution and the requisite jurisdictional amount, the jurisdiction of the District Court, and of this court upon a direct review of its action, extends to all other questions involved, whether of federal or state law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectually dispose of the case. P. 482.
2. Equity will enjoin collection of an illegal tax in the absence of an adequate and certain remedy at law. P. 482.
3. The Act of North Dakota, Laws 1919, c. 222, which lays an excise on foreign corporations of a percentage of their capital actually invested in the transaction of business in the State, provides that, for one engaged in business within and without the State, investment within the State shall mean that proportion of its entire stock and bond issues which its intrastate business bears to its total business; that where the business within the State is not otherwise

easily and certainly separable, it shall be held to mean such proportion of the entire business as the property of the corporation within the State bears to its entire property, and that, in the case of a railroad or other specified public service corporation, whose line extends into the State from without, property within the State shall mean the proportion of the entire property of the corporation which its mileage within the State bears to its entire mileage. *Held*, that the mileage basis (declared unconstitutional in *Wallace* v. *Hines*, 253 U. S. 66), was intended to be the exclusive basis for computing the assessments of such a railroad company, and that assessments based on the ratio of the value of its railroad within the State to that of its entire railroad were not authorized by the statute. P. 482.

4. The unconstitutionality of an excepting provision in a statute does not enlarge the scope of its other provisions. P. 484.

Reversed.

APPEAL from a decree of the District Court, after a final hearing on bill and answer, dismissing a bill filed by the Director General of Railroads and five railroad companies to enjoin the collection of a special excise tax sought to be imposed under North Dakota Laws, 1919, c. 222.

Mr. Charles W. Bunn, with whom *Mr. E. C. Lindley*, *Mr. M. L. Countryman* and *Mr. D. F. Lyons* were on the brief, for appellants.

Mr. George E. Wallace for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the Director General of Railroads and five railroad companies to enjoin the collection of a special excise tax assessed against each of the companies for the years 1918 and 1919 under a statute of North Dakota, c. 222, Laws 1919, which declares:

"Every corporation, joint-stock company or association, now or hereafter organized under the law of any other State, the United States or a foreign country, and

engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the State; provided, that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the State shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation."

Each of the five railroad companies was subjected in the usual way to a full property tax on all of its property within the State, and that tax is not here in question. The suit relates only to the special excise tax.

The companies were all organized under the laws of States other than North Dakota and all own lines of railroad extending from other States into or through that State. These lines were under federal control and operated by the Director General during the years for which the excise tax was assessed.

The taxing officers at first assessed the tax for the year 1918 against these companies by using in its computation the mileage ratio prescribed in the second proviso of the statute; but this court held that the tax so assessed was an unwarranted interference with interstate commerce and a taking of property without due process of law. *Wallace* v. *Hines*, 253 U. S. 66. Thereupon the taxing officers assessed the tax for that year, and also for 1919, by using in its computation the ratio specified in the last preceding clause of the statute—that is to say, a ratio fixed by contrasting the value of the company's railroad within the State with the value of its entire railroad within and without the State.

In the District Court the validity of the tax assessed on the new or substituted basis was challenged on the grounds (a) that as to railroad companies whose lines lie partly within and partly without the State the statute does not authorize or sanction a tax assessed on that basis; (b) that the statute imposes the tax only as a special excise on doing business in the State, and these companies were not thus engaged during the years for which the tax was assessed,—their railroads being then under federal control and operated exclusively by the Director General; and (c) that an excise tax assessed against these companies on the new or substituted basis operates necessarily to burden interstate commerce and to take property

without due process of law, and so is in conflict with the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment.

At an early stage in the suit three judges granted an interlocutory injunction against the enforcement of the tax; but on the final hearing, which was on bill and answer, a decree was entered dismissing the bill on the merits. The plaintiffs then sought and were allowed a direct appeal to this court under § 238 of the Judicial Code.

The case made by the bill involved a real and substantial question under the Constitution of the United States and the amount in controversy exceeded three thousand dollars, exclusive of interest and costs, so the case plainly was cognizable in the District Court. In such a case the jurisdiction of that court, and ours in reviewing its action, extends to every question involved, whether of federal or state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 620; *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. R. Co.* v. *Gorrett*, 231 U. S. 298, 303; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508.

As respects the right to sue in equity, it is enough to say that in this case we find the same absence of an adequate and certain remedy at law that was found in *Wallace* v. *Hines, supra,* where the right to invoke the aid of a court of equity was sustained.

The first of the objections made to the tax is that it was assessed on a basis which the statute does not authorize or sanction. Of course, if this be so the tax must fall, and the other objections need not be considered. The statute does not prescribe a single or unvarying basis whereon the tax shall be assessed, but designates several bases and

defines the particular situation in which each shall be applied. Where the business of the corporation is wholly within the State the tax is to be computed according to the "capital actually invested" in the business. Where the business is partly within and partly without the State the computation is to be based on a proportion of the company's "entire stock and bond issue", which is to be taken as representing the "investment within the State." But the proportion is to be determined by standards which vary materially. In one situation it is to conform to the ratio of the company's business within the State to its total business, and in another to the ratio of the company's property employed in its business within the State to its entire property employed in its business wherever conducted. In the instance of railroad companies and other public utility corporations having lines partly within and partly without the State the statute specially provides that it shall conform to the ratio of the company's mileage within the State to its entire mileage. This special provision is embodied in a proviso or excepting clause which comes immediately after the clause relating to other corporations and reads as follows:

" . . . provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State."

This provision shows that the legislature intended by it to put the corporations which it describes in a separate class for the purposes of the tax, to require as to them that the tax be computed and assessed on the special basis there prescribed, and to exempt them from the bases

applicable to other corporations. That intention hardly could have been more clearly expressed.

True, this provision was held in *Wallace* v. *Hines*, *supra*, to be in conflict with constitutional limitations and indefensible as respects the railroad companies now before us; but that does not make the provision any the less a key to the intention of the legislature, or enable the taxing officers to subject these corporations to other provisions from which the act as a whole shows the legislature intended to except them.

Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain. The reasoning on which the decisions proceed is illustrated in *State ex rel. McNeal* v. *Dombaugh*, 20 Ohio St. 167, 174. In dealing with a contention that a statute containing an unconstitutional proviso should be construed as if the remainder stood alone, the court there said: "This would be to mutilate the section, and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffectual for want of power, as from that which is authorized by law."

Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that

restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application. Had they been enacted without the excepting provision and had it been embodied in a subsequent amendatory act a different situation would be presented—one in which that provision would have no bearing on the meaning or scope of the others—because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment. This was recognized in *Truax* v. *Corrigan, ante,* 312, where, when an amendatory exception proved unconstitutional, we held that the original statute stood wholly unaffected by it.

From what has been said it follows that to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course we cannot so hold.

We are accordingly of opinion that the first objection to the tax is well taken, and therefore that the tax is invalid and its collection should be enjoined.

Decree reversed.